Supreme Court, U.S.
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No. 02-___

IN THE

Supreme Court of the United States

Keith Shwayder,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether and to what extent the presumption of prejudice from conflicting representation adopted in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), applies in cases of successive representation, a question this Court left open in *Mickens* v. *Taylor*, 535 U.S. 162 (2002)?

2. When defense counsel in a criminal prosecution operates under a conflict of interest, what legal standard governs whether the conflict has an "adverse effect" under *Sullivan*, a question on which the circuits have developed three irreconcilable tests?

3. When defense counsel in a criminal prosecution must vigorously attack a former client from a closely related matter in order to represent a present client effectively, what legal standard governs whether the conflict had an "adverse effect" on the representation for purposes of *Sullivan*?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, Michael G. Swan and Kevin Orton were defendants-appellants in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Shwayder respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-21a) is published at 312 F.3d 1109. The opinion of the Ninth Circuit denying rehearing and rehearing en banc and amending the panel opinion (Pet. App. 26a-28a) is published at 320 F.3d 889. The district court's orders denying petitioner's motion for a new trial and his motion for reconsideration of his motion for a new trial (Pet. App. 22a-25a) are unpublished.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

JURISDICTION

The Ninth Circuit entered its opinion on December 5, 2002. On February 24, 2003, the Ninth Circuit entered its order denying rehearing and rehearing en banc and amending the panel opinion. On May 15, 2003, Justice O'Connor extended the time to file a petition for certiorari to and including June 24, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case presents fundamental and unresolved questions of law relating to the Sixth Amendment right to counsel upon which the courts of appeals are in conflict. This Court held in *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-49 (1980), that a defendant is presumptively prejudiced if his counsel labored under an "actual conflict of interest" that had an "adverse

effect" – in the form of "an actual lapse in representation" – on his attorney's performance. The *Sullivan* presumption reflects this Court's "refus[al] 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'" *Sullivan*, 446 U.S. at 349 (quoting *Glasser* v. *United States*, 315 U.S. 60, 76 (1942)). See also *Rubin* v. *Gee*, 292 F.3d 396, 402 (CA4) (Wilkinson, C.J.), cert. denied, 123 S. Ct. 637 (2002) ("This presumption of prejudice arises because 'it is difficult to measure the precise effect on the defense' when representation is 'corrupted by conflicting interests.'" (citations omitted)).

Sullivan was a case of concurrent representation, not "successive" representation, as when counsel is forced to examine a former client who appears adversely to a current client. In *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1245-46 (2002), this Court expressly avoided addressing "the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." This case presents the opportunity for the Court to resolve the issue it left open in *Sullivan*. The Court should take this opportunity to hold that the presumption of prejudice applies in cases of successive representation when (as in this case) the current and former matters are closely related.

This Court has also thus far left unresolved the critical question of what constitutes an "adverse effect" sufficient to trigger the *Sullivan* presumption. "[T]here is no Supreme Court precedent, but a split in circuit authority, regarding the appropriate conflict of interest standard." *Quinones* v. *Miller*, No. 01 Civ 10752, 2003 U.S. Dist. LEXIS 9176, at *122 (S.D.N.Y. June 3, 2003) (report and recommendation of magistrate judge).

An entrenched three-way conflict exists. Two courts of appeals – including the Ninth Circuit in this case – refuse to

find a violation of the Sixth Amendment as long as counsel provided "the type of representation" as he would have absent the conflict. Indeed, the Ninth Circuit requires that "an adverse effect in the *Sullivan* sense must be one that *significantly worsens* counsel's representation" (*United States* v. *Mett*, 65 F.3d 1531, 1535-36 (1995) (emphasis added)), which is a "*substantial hurdle*" to a claim under the Sixth Amendment (*Maiden* v. *Bunnell*, 35 F.3d 477, 481 (1994) (emphasis added)). By contrast, six circuits find it determinative whether the scope of the attorney's representation was in some respect constrained as a result of the conflict. These courts find an adverse effect, and thus a violation of the Sixth Amendment, if the defendant can "demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *E.g.*, *United States* v. *Malpiedi*, 62 F.3d 465, 469 (CA2 1995). Two further circuits take a middle ground, adding the requirement that the alternative strategy be "reasonable." *E.g.*, *Freund* v. *Butterworth*, 165 F.3d 839, 860 (CA11), cert. denied, 528 U.S. 817 (1999).

The disagreement among the courts of appeals has particular consequence for the recurring factual scenario of this case: in a criminal prosecution, an attorney's former client from a closely related matter appears as a government witness adverse to a present client. In these circumstances, the attorney's duties of loyalty and confidentiality to the former client *forbid* remaining in the case despite the conflict. See A.B.A. Model Rule of Prof. Conduct 1.9. But attorneys nonetheless regularly continue notwithstanding their clear ethical obligations to the contrary. The Ninth Circuit in this case found that petitioner's counsel had a plain conflict of interest when a former client pleaded guilty and appeared as the principal government witness against petitioner. But the court of appeals, applying the minority standard for finding an "adverse effect" on the representation, found no Sixth

Amendment violation. Other courts of appeals, by contrast, not only recognize that ethical constraints make it exceedingly unlikely that the attorney could provide effective representation in these circumstances but also refuse to engage in the Ninth Circuit's *post hoc* rationalization of the trial proceedings. See, *e.g.*, *Malpiedi*, 62 F.3d at 468-69 (holding that attorney's conflict of interest arising from prior representation of key prosecution witness had adverse effect on his representation of defendant, notwithstanding district court's findings that, *inter alia*, attorney's cross-examination of witness was "very effective").

Certiorari accordingly should be granted.

1. Petitioner Keith Shwayder was the founder and developer of Teletek, a NASDAQ-listed company that (at the time relevant to these proceedings) installed cables for telephone systems and computer networks. More than a decade after founding Teletek and expanding the business, petitioner in 1991 was approached by an individual named Michael Swan, who held a controlling share in another company, United Payphone ("UPAY"). Swan proposed a Teletek-UPAY merger. Unbeknownst to petitioner, Swan was engaged in a scheme of bribing stockbrokers to sell UPAY stock to their clients in order to raise the stock price of UPAY. He sought the merger to take advantage of Teletek's NASDAQ listing.

Petitioner agreed to the merger and essentially stepped aside. Swan promptly succeeded petitioner as CEO and chairman of the board of directors. Swan moved Teletek's headquarters from Denver (where petitioner lived) to Las Vegas and changed the company's counsel and also its accountants. Less than eight months after the merger, petitioner resigned entirely from Teletek.

Before, during, and after petitioner's brief tenure at the post-merger Teletek, Swan continued bribing stockbrokers to sell stock, using methods that included cash payments to the brokers and the issuance of stock in return for phantom

consulting services. Petitioner's position has always been that he was unaware of the bribery scheme.

Swan's bribery later came under suspicion. A Las Vegas grand jury investigating bribery raised allegations that Swan had testified falsely in an SEC deposition regarding bribes to stockbrokers. Swan was also the subject of a lawsuit alleging bribery. Bribery allegations were furthermore raised against Swan in criminal proceedings against a California stockbroker. From October 1994 to March 1995, Swan was represented in these matters by an attorney named John Schlie (who would later take center stage in the proceedings). Swan repeatedly insisted to Schlie that he had never bribed stockbrokers.

As the grand jury investigation relating to Swan's conduct continued, petitioner in August 1996 sought to retain Schlie to represent him with respect to the investigation. Schlie sought a waiver of the resulting conflict of interest from Swan. Schlie's contemporaneous notes indicate that Swan authorized him to speak with petitioner only "as long as I don't have to breach [Swan's] atty/client privilege." The waiver therefore provided that Swan "did *not* * * * authorize [Schlie] to disclose any information subject to [his] attorney-client privilege" (emphasis in original).[1]

2. Swan and petitioner – along with Swan's wife and two others – were subsequently indicted on charges arising out of the same grand jury investigation in which Schlie had represented Swan. Swan's wife and one of the men pleaded guilty before trial. But Swan did not.

Schlie continued to serve as petitioner's counsel. In February 1998, the three remaining defendants – Swan,

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[1] Schlie also sought a conflict waiver from petitioner. For a variety of reasons, the government has explicitly abandoned reliance on the waiver. See Gov't C.A. Br. 38. The court of appeals also found the waiver utterly inadequate. Pet. App. 11a-12a.

petitioner, and Kevin Orton – entered into a joint defense agreement. The grand jury subsequently returned a second superseding indictment as to all three defendants, alleging that they had inflated the value of shares in UPAY and Teletek. The specific counts of the indictment charged them with RICO, RICO conspiracy, securities fraud, conspiracy to commit securities fraud, wire fraud, and money laundering.

Petitioner was jointly tried with Swan and Orton in a two-month trial beginning in October 1999. As the case went to trial, the government's case against petitioner was weak. Petitioner had created and developed Teletek as a reputable business for more than a decade. He had a reputation as a law-abiding and respected businessman, as reflected in character witnesses who testified at trial. The government relied principally on a disgruntled former employee who was discredited in a withering cross-examination. The other witness was another person implicated in Swan's scheme and who transparently sought to deflect blame away from himself.

From the onset of the trial, the logical strategy for Schlie to pursue on petitioner's behalf in seeking an acquittal was therefore to place the blame for the bribery scheme on Swan and to portray petitioner as yet another victim of Swan's scheme. In particular, pre-trial discovery and the evidence presented at trial demonstrated that Swan had committed multiple acts of bribery over several years; that petitioner's tenure at Teletek had overlapped Swan's by less than eight months; that petitioner had not previously known Swan before the Teletek merger and had no relation with him after leaving Teletek; and that the evidence of petitioner's knowledge of Swan's bribery scheme was tenuous. But that strategy would have placed Schlie in direct conflict with Swan, both as to Schlie's duty of loyalty and also as to his duty to retain confidences relating to the grand jury proceedings.

During the first part of the trial, Schlie's defense of petitioner was therefore a joint defense. Not only did Schlie fail to make any effort to place the blame for the bribery scheme on Swan, but – during the first several days of the trial – it would in fact have been difficult for an observer to discern that Schlie represented petitioner, rather than Swan. Thus, his opening statement focused in large part on a general description of the securities industry, without any significant discussion of the defendants' individual roles in the conduct at issue. Schlie made virtually no effort to distance petitioner from Swan's conduct, including by contrasting the integrity of petitioner with that of Swan, and indeed never hinted that Swan had done anything wrong. Moreover, his entire introduction of petitioner consisted of two sentences: "Could you stand up, Mr. Shwayder, please? Mr. Shwayder is a businessman from Denver, Colorado."

Midway through the trial, however – well after opening statements and the presentation of an array of evidence – Swan recognized that the evidence against him personally was overwhelming. He pleaded guilty to all of the charges against him and became the principal witness against petitioner in exchange for a reduced sentence. Swan made extremely damaging claims against petitioner regarding the pivotal issue in the case – *viz.*, whether petitioner knew that Swan had bribed brokers to promote and sell Teletek stock. Indeed, in some instances, Swan was the sole source of evidence for the prosecution.

This development sharpened further the already substantial conflict faced by Schlie between his duties to petitioner as his present client and Swan as his former client. Indeed, it raised the prospect that Schlie would have to appear as a witness in the proceedings to describe Swan's previous false statements to him, a result that would have required Schlie to disqualify himself and return the substantial fee he had received from petitioner.

During his cross-examination of Swan and his closing argument, Schlie failed to attack Swan's credibility vigorously. Specifically, Schlie did not make any substantial effort to impeach Swan's credibility as a witness by attempting to establish not only that Swan had lied to petitioner and others in the past, but also that Swan was lying to the jury to win a reduced sentence under Sentencing Guideline § 5K1.1. Moreover, Schlie never sought to elicit the fact that, while he was representing Swan, Swan had also lied to him about his efforts to bribe brokers to promote Teletek stock. The jury returned guilty verdicts, as well as forfeiture verdicts, as to most of the charges against Orton and petitioner on December 23, 1999.

3. Represented by new counsel post-trial, petitioner moved for a new trial based on Schlie's conflict of interest arising from his representation of Swan and petitioner. The district court denied the motion. Pet. App. 22a-23a.

On March 7, 2001, the district court sentenced petitioner to eighty-seven months in prison, ordered petitioner to pay $1.5 million in restitution, and entered a final order of forfeiture in the amount of $414,334. But because the court found that the effect of Schlie's conflict of interest presented a substantial question, the trial court stayed petitioner's sentence pending appeal.

4. On appeal, petitioner argued that Schlie's prior representation of Swan on matters substantially related to petitioner's case amounted to a conflict of interest that sufficiently interfered with the representation, violating petitioner's Sixth Amendment right to conflict-free counsel. Petitioner urged the court of appeals to adopt the Second and Tenth Circuits' holdings that a prior conflicting representation has an adverse effect on defense counsel's performance "if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." Pet'r C.A. Br. 36 (quoting *Church* v. *Sullivan*, 942

F.2d 1501, 1512 (CA10 1991), and citing *Amiel* v. *United States*, 209 F.3d 195, 199 (CA2 2000)). By contrast, the government urged that the case was controlled by Ninth Circuit precedent holding that the "'adverse effect prong' does not require proof of prejudice, but 'remains a substantial hurdle.'" Gov't C.A. Br. 34 (quoting *United States* v. *Mett*, 65 F.3d 1531 (1995), cert. denied, 519 U.S. 870 (1996)).

The court of appeals agreed with petitioner that Schlie's representation of Swan and petitioner amounted to a flat conflict of interest:

> Schlie represented Swan in matters that directly concerned bribing stockbrokers to sell Teletek stock. From the beginning of this litigation, [petitioner] had an interest in laying the blame on Swan and portraying himself as the victim. The conflict between the two alleged coconspirators became greater when Swan agreed to plead guilty and testify against [petitioner] for the prosecution. By shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan – or at least could have feared that he would appear to do so and therefore avoided certain areas of inquiry.

Pet. App. 13a (citation omitted).

The court of appeals also recognized the substantial prospect that such a conflict would have an adverse effect on Schlie's representation of petitioner. The conflict implicated both Schlie's duty to keep confidences and his distinct duty to remain loyal. Regarding the former, "[o]ne of the risks created by successive representation is that the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination [of that client] for fear of misusing that confidential information. The potential for conflict is particularly acute when the two clients are co-defendants who allege different levels of culpability."

Pet. App. 12a-13a (citation omitted) (alteration in original). Regarding the latter, "Swan had yet to be sentenced. Effective testimony could have affected his sentence through a substantial assistance departure. Conversely, if [Schlie established that] Swan lied on the stand, an obstruction of justice enhancement was a possibility." *Id.* 13a n.4.

Yet the Ninth Circuit refused to find that this palpable conflict had an "adverse effect" on Schlie's representation of petitioner. The court held that petitioner was required to establish that "counsel *was influenced* in his *basic* strategic decisions by the interests [of the former client], as where the conflict *prevents* an attorney * * * from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other." Pet. App. 13a (citation omitted) (alteration in original) (emphasis added).

Schlie unquestionably did not adopt a consistent strategy, beginning with the opening statement, of arguing and proving to the jury that petitioner had not participated in Swan's extensive scheme, which pre- and post-dated petitioner's relationship with Swan. Yet the court of appeals deemed it sufficient that in the opening statement, Schlie stated "that the trial would come down to knowledge and that the jurors would have to make their decisions on each individual defendant independently." Pet. App. 15a.

Schlie also unquestionably made little effort to impeach Swan's testimony, including by raising Swan's own false statements to Schlie. Yet the court of appeals deemed it sufficient that Schlie examined *other* "witnesses with questions directed at establishing that Swan alone was to blame." Pet. App. 15a. The only exceptions were that Swan acknowledged on Schlie's examination that 'Swan never told Shwayder that he was paying off stockbrokers" and that he was receiving a reduced sentence for testifying. *Id.* The Ninth Circuit also found it significant that Schlie conceivably could have evaded in part his duty to maintain Swan's

confidences by relying on non-confidential materials, such as "the indictment, the trial testimony, and the evidence provided to the defense on discovery." *Id.* 16a.

Finally, the court of appeals refused to assign any weight to the fact that Schlie utterly failed to attack Swan's credibility through Swan's own previous lies to Schlie. "There was one fact not available from an independent source – that Swan had lied to Schlie during his prior representation. It is impossible, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie's communications with Swan were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either." Pet. App. 16a. Furthermore, Schlie stated in closing argument that "Swan had lied to everyone else, specifically mentioning 'his [other] lawyer,' as well as Shwayder." *Id.*[2]

5. Petitioner moved for a stay of the mandate, highlighting the conflict among the courts of appeals regarding the adverse effect that must be shown from counsel's conflict of interest to establish a violation of the Sixth Amendment. The Ninth Circuit granted the motion and this petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. *First*, this case presents the opportunity to decide an important and recurring question left open by *Mickens* v. *Taylor*, 535 U.S. 162 (2002): whether and to what extent the presumption of prejudice established by *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), applies in cases of successive, rather than multiple, representation. The Court should hold that *Sullivan* applies

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[2] The court of appeals inaccurately attempted to buttress its holding by stating that Schlie "emphasized" Swan's previous lies and "emphasized" that each defendant's guilt must be judged independently. Each of those statements is actually just a passing reference in the closing and opening arguments, respectively.

when (as in this case) the successive representation is closely related to the prior representation. *Second*, this case presents the opportunity to resolve the entrenched circuit split over the standard for finding an "adverse effect" under *Sullivan*. Such a conflict on this basic question of federal constitutional law is intolerable. The Court should adopt the majority view in the circuits that an adverse effect is established when a conflict of interest impedes counsel from pursuing an otherwise available strategy or tactic. Under that standard, petitioner's conviction must be reversed.

I. This Case Presents The Court With The Opportunity To Decide The Important And Recurring Question Whether And To What Extent *Sullivan*'s Presumption Of Prejudice Applies To Cases Of Successive Representation.

In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that prejudice will be presumed for a defendant alleging a violation of the Sixth Amendment right to counsel if that defendant can demonstrate that an actual conflict of interest had an adverse effect – in the form of "an actual lapse in representation" – on his attorney's performance. *Sullivan* was a case of multiple concurrent representation, not successive representation. In *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1245-46 (2002), this Court expressly avoided addressing "the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question."

Mickens thus in some respects "called into question the integrity of the post-*Sullivan* superstructure constructed in [the] circuits." *Lombardo* v. *United States*, 222 F. Supp. 2d 1367, 1381 (S.D. Fla. 2002). But the lower courts have resolutely adhered to their pre-*Mickens* positions, no doubt because this Court's discussion of successive representation was dictum that did not even propose a resolution of the issue. The lower courts have, however, "predict[ed] that a Supreme

Court decision lingers on the horizon that expressly will limit the application of *Sullivan* in cases of successive representation." *Moss* v. *United States*, 323 F.3d 445, 462 (CA6 2003).

The law accordingly stands in a state of flux that would benefit considerably if this Court were in this case to resolve the issue it flagged in *Mickens*. In the Ninth Circuit, it remains "more difficult for a defendant to show that counsel actively represented conflicting interests in successive rather than simultaneous representation" (*United States* v. *Christakis*, 238 F.3d 1164, 1169 (2001)), a rule that raised the bar for petitioner to establish a violation of the Sixth Amendment.

On the other hand, subsequent to *Mickens*, the Sixth Circuit has held that the *Sullivan* presumption applies when (as in petitioner's case) the prior and current matters are "nearly identical." *Moss* v. *United States*, 323 F.3d 445, 462 (2003). The Fourth and Eighth Circuits have adhered to their precedents broadly applying *Sullivan* to all successive representation cases subsequent to *Mickens*. *United States* v. *Young*, 315 F.3d 911, 915 n.5 (CA8 2003); *Rubin* v. *Gee*, 292 F.3d 396, 408 (CA4), cert. denied, 123 S. Ct. 637 (2002). The Tenth Circuit also long ago rejected any effort to cabin *Sullivan* to cases of multiple representation as "inconsistent with our" prior Sixth Amendment precedents. *Church* v. *Sullivan*, 942 F.2d 1501, 1511 (1991).

The Sixth Circuit's rule that *Sullivan* applies when the subjects of the former and current representations are closely related is the correct one and should be adopted by this Court. As that court explained:

> While * * * there is a lesser likelihood of prejudice in traditional cases of successive representation, such as where the attorney is compelled to cross-examine a former client and the former representation bore only a "substantial relation" to the current proceedings, the probability of prejudice

> dramatically increases in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding. * * * This probability reaches near certainty where, as here, the attorney's former and current clients collaborate to mount a defense. This extreme likelihood of prejudice, and the corresponding difficulty in demonstrating that prejudice, warrant the application of *Sullivan* to the petitioners' claims.

Moss, 323 F.3d at 462. Moreover, as the Fifth Circuit has explained:

> Unlike competency of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to the denial of counsel itself.

Perillo v. *Johnson*, 205 F.3d 775, 806 n.13 (2000) (quoting *United States* v. *Alvarez*, 580 F.2d 1251, 1256-57 (CA5 1978)). See also *id.* ("[A] cold record may not reveal 'the erosion of zeal that may ensue from divided loyalty.'" (quoting *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974))); *Rubin* v. *Gee*, 292 F.3d 396, 402 (CA4) (Wilkinson, C.J.) ("When lawyers' conflicts of interest adversely affect their performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice."), cert. denied, 123 S. Ct. 637 (2002). This Court in *Strickland* v. *Washington* explained that there is "a fairly rigid rule of presumed prejudice for conflicts of interest" precisely because it "is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." 466 U.S. 668, 696 (1984). Rigorous scrutiny of the detrimental consequences of attorney conflicts of interest is

essential to effectuating the Sixth Amendment right to counsel and to preserving confidence in the criminal justice system.

Certiorari accordingly should be granted to decide whether and to what extent the *Sullivan* presumption of prejudice applies in cases of successive representation.

II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over The Proper Standard For Finding An "Adverse Effect" Sufficient To Establish A Sixth Amendment Violation Under *Sullivan*.

A. The lower courts are intractably divided.

Although this Court held twenty-three years ago in *Sullivan* held that a presumption that a conviction violates the Sixth Amendment arises when counsel operates under an "actual conflict" that has an "adverse effect" upon the representation (446 U.S. 335, 350 (1980)), those "are not self-defining phrases" (*United States* v. *Bowie*, 892 F.2d 1494, 1500 (CA10 1990)). This Court's explication of *Sullivan*'s "adverse effect" requirement has accordingly been criticized by the lower courts as "rather vague." *Beets* v. *Collins*, 65 F.3d 1258, 1265 (CA5 1995) (en banc). There is "no Supreme Court precedent, *but a split in circuit authority*, regarding the appropriate conflict of interest standard." *Quinones* v. *Miller*, No. 01 Civ 10752, 2003 U.S. Dist. LEXIS 9176, at *122 (S.D.N.Y. June 3, 2003) (magistrate judge's report and recommendation) (emphasis added). Indeed, in cases in which "*Cuyler* [v. *Sullivan*] controls," the state and federal courts have long

> been confused about the actual test to apply and thus have had difficulty applying it. Some courts have held that once an actual conflict is shown, ineffectiveness is also shown. Other courts have had difficulty distinguishing between adverse effect and prejudice; thus, once actual conflict is shown, these courts discuss whether the conflict prejudiced

> defendant's case. The third approach taken by courts holds that [*Sullivan*] requires proof of an actual conflict and then proof that the conflict had an adverse effect.

State v. *Jenkins*, 715 P.2d 716, 719 (Ariz. 1986) (citing *Parker* v. *Parratt*, 662 F.2d 479 (CA8 1981); *Brown* v. *State*, 275 S.E.2d 52 (Ga. 1981), overruled on other grounds, *Wilson* v. *Zant*, 290 S.E.2d 442 (Ga. 1982); *Commonwealth* v. *Michel*, 409 N.E.2d 1293 (Mass. 1980)).

In one camp stands a substantial majority of the courts of appeals: the First, Second, Third, Fifth, Sixth, and Tenth Circuits. Those courts hold that "a defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." See, *e.g.*, *Moss* v. *United States*, 323 F.3d 445, 466 (CA6 2003); *United States* v. *Burgos-Chaparro*, 309 F.3d 50, 53 (CA1 2002), cert. denied, 123 S. Ct. 922 (2003); *United States* v. *Armienti*, 313 F.3d 807, 811 (CA2 2002); *Duncan* v. *Morton*, 256 F.3d 189, 197 (CA3 2001); *Perillo* v. *Johnson*, 205 F.3d 775, 781 (CA5 2000); *Church* v. *Sullivan*, 942 F.2d 1501, 1512 (CA10 1991); *United States* v. *Rodriguez*, 929 F.2d 747, 751 (CA1 1991) (per curiam) (Breyer, C.J., on panel). This "is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that 'was inherently in conflict with' a plausible line of defense or attack on the prosecution's case." *United States* v. *Malpiedi*, 62 F.3d 465, 469 (CA2 1995).

In another camp – applying an intermediate test – stand the Fourth and Eleventh Circuits. They apply the majority rule except that they reject the view that the asserted

alternative strategy or tactic need not even have been reasonable. The defendant must demonstrate "that a plausible alternative defense strategy existed that '[his] defense counsel might have pursued,' that this 'alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision,' and that 'the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.'" *Rubin* v. *Gee*, 292 F.3d 396, 404 (CA4) (quoting *Mickens* v. *Taylor*, 240 F.3d 348, 361 (CA4 2001) (en banc), aff'd, 535 U.S. 162 (2002)), cert. denied, 123 S. Ct. 637 (2002); *Freund* v. *Butterworth*, 165 F.3d 839, 860 (CA11 1999).

The final camp – applying the minority test – includes the Seventh and Ninth Circuits. The Ninth Circuit held in this case that petitioner was required to establish that "counsel was influenced in his *basic strategic decisions* by the interests [of the former client], as where the conflict *prevents* an attorney * * * from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other." Pet. App. 13a (citation omitted) (alteration in original) (emphasis added). Under the Ninth Circuit's minority view, "an adverse effect in the *Cuyler* sense must be one that *significantly worsens* counsel's representation." *United States* v. *Mett*, 65 F.3d 1531, 1535-36 (1995) (emphasis added). As the government argued below (see *supra*), that court avowedly interposes its adverse effect standard as a "*substantial hurdle*" to a claim under the Sixth Amendment. *Maiden* v. *Bunnell*, 35 F.3d 477, 481 (1994) (emphasis added).

The Seventh Circuit similarly finds a Sixth Amendment violation only if "the defense attorney was *required* to make a choice advancing his own interests to the detriment of his client's interests." *Stoia* v. *United States*, 22 F.3d 766, 771 (CA7 1994) (quoting *United States* v. *Ziegenhagen*, 890 F.2d 937, 939 (CA7 1989) (quoting, in turn, *United States* v. *Horton*, 845 F.2d 1414, 1419 (CA7 1988))). The "defendant has the burden of showing specific instances where counsel

could have and would have done something different." *Griffin* v. *Camp*, 40 F.3d 170, 173 (CA7 1994).

The conflict arises in part from the Ninth Circuit's basic misapprehension of this Court's precedents. The opinion below erroneously cites *Wheat* v. *United States*, 486 U.S. 153, 160 (1988), as requiring the defendant to prove that "counsel was influenced in his basic strategic decisions" and that the conflict "prevent[ed] [the] attorney" from vigorously defending the defendant by "arguing the relative involvement and culpability of his clients." Pet. App. 13a. *Wheat* applies no such test. Rather, the "basic strategic decisions" language actually appears in *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981), in which the Court did not announce a Sixth Amendment standard but rather remanded because it could not "be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." The "prevents an attorney" language appears in *Wheat*, but is a quotation from *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), which similarly did not adopt a Sixth Amendment standard but rather highlighted the great *dangers* that arise when an attorney is faced with fulfilling conflicting duties in the criminal context. The conflict may

> prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.

Id. at 490.

It is therefore not surprising that *no* other court of appeals has employed the Ninth Circuit's minority test in determining

whether a conflict of interest adversely affected the defendant's representation under *Sullivan*. To the contrary, subsequent to the Ninth Circuit's decision in this case, the Sixth Circuit acknowledged the "basic strategic decisions" formulation from this Court's decision in *Wood*, but reiterated that it joined the Second Circuit in holding that the defendant need show "only that some *plausible* alternative defense strategy or tactic *might* have been pursued." *Moss* v. *United States*, 323 F.3d 445, 466 (2003) (quoting *Amiel* v. *United States*, 209 F.3d 195, 199 (CA2 2000)) (emphases added). Similarly, the en banc Fourth Circuit in the *Mickens* decision subsequently affirmed by this Court acknowledged the "basic strategic decisions" formulation, but held that the defendant need only demonstrate a "plausible defense strategy," adding that the strategy must have been "reasonable under the facts of the case known to the attorney." *Mickens*, 240 F.3d at 360-61. The Fourth Circuit has also discussed this Court's statement that a conflict may "prevent the attorney" from vigorously representing a client, holding that a Sixth Amendment violation is established so long as the defendant shows there "was a plausible alternative defense strategy which was reasonable under the facts of the case and that the failure to pursue this strategy was linked to [the] conflict of interest." *Rubin*, 292 F.3d at 405 (quoting *Holloway*, *supra*).

As petitioner now shows, this case is an excellent vehicle to resolve this acknowledged three-way conflict.

B. The circuit split is outcome determinative in this case.

1. Petitioner's best hope for an acquittal in this case was the strategy that his counsel did not employ: an all-out, no-holds-barred attack on Swan, from the beginning of the trial through closing arguments. This attack would have had two prongs. First, during his opening statement and the first half of the trial, Schlie could have placed all of the blame for the bribery scheme on Swan and portrayed petitioner as the victim of Swan's duplicity. He could have delivered (but

critically did not) an opening argument that depicted Swan as someone who had repeatedly bribed stockbrokers prior to the Teletek merger and continued to do so long after petitioner left Teletek. He could have contrasted that portrayal with a description of petitioner as an honest businessman who had built Teletek and run the company lawfully, and whom Swan had merely used to fulfill his goal of obtaining a NASDAQ listing and then discarded shortly after the merger. Finally, in the opening statement and initial testimony, he could have challenged (but did not) Swan's veracity, outlining Swan's myriad lies to petitioner and others to conceal his bribery scheme.

By adopting an aggressive "blame Swan" strategy throughout the first half of trial, Schlie would have laid the foundation to continue the strategy through the second half of the trial, after Swan pleaded guilty and provided damaging testimony against petitioner as a government witness. During the second half of the trial, Schlie could have vigorously attacked Swan's credibility as a witness during his cross-examination and his closing argument, just as he did with another government witness (Annette Rosenberg) with whom he did not have an attorney-client relationship. Thus, Schlie could have aggressively cross-examined Swan regarding all of the lies that he had previously told to, *inter alios*, his wife, his close friend and former co-defendant Orton, petitioner, and even his attorneys. Further, he could have argued that Swan had lied to the jury to win a reduced sentence.

Schlie did none of these things. Indeed, there is no way he ethically could have. As even the Ninth Circuit acknowledged, "By shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan * * *." Pet. App. 13a. Petitioner's case was tried in Nevada, which applies the ABA Model Rules of Professional Conduct. See Nev. S. Ct. R. 150. Under Model Rule 1.9(a), "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the

same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Under Model Rule 1.9(c), with exceptions not relevant here, "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter * * * use information relating to the representation to the disadvantage of the former client" or "reveal information relating to the representation."

Schlie and his former client Swan both would have potentially faced serious consequences had Schlie vigorously attacked Swan. An aggressive cross-examination of Swan would have disclosed Swan's prior false statements and highlighted the breadth of Swan's criminal activity. It would therefore have subjected Swan to perjury and obstruction of justice charges, as well as potential further bribery charges, and jeopardized his chances of obtaining a downward departure at sentencing. See Pet. App. 13a ("Effective testimony could have affected [Swan's] sentence through a substantial assistance departure. Conversely, if Swan lied on the stand, an obstruction of justice enhancement was a possibility."). By cross-examining Swan about his lies, Schlie also risked being forced into the role of a witness and, as a result, being disqualified as petitioner's trial counsel, thereby endangering the $160,000 fee – one of the largest that he received between 1996 and 1999 – paid to him by petitioner. And, as noted, Schlie would have faced disciplinary action by the Nevada bar.

Accordingly, although the court of appeals asserted that "Schlie carried out precisely the *type* of representation [petitioner] maintained that his trial attorney could not and did not provide because of his conflict," (Pet. App. 15a (emphasis added)), that is so (if at all) only in the sense that the Ninth Circuit sets an exceedingly high bar to demonstrating an adverse effect on counsel's representation. For example, the fact that Schlie sought to undermine Swan's

credibility by examining *other* witnesses (*id.* 15a), is no substitute for the more plausible strategy of attacking Swan directly. And the fact that Schlie supposedly *could have* attacked Swan with non-confidential materials (*id.* 16a) is no answer when Schlie in fact failed to do so.

2. In these circumstances, a clear majority of circuits would hold that the conflict of interest under which Schlie labored constituted an "adverse effect" under *Sullivan*. Aggressively attacking Swan's credibility throughout the trial manifestly was a "seemingly valid or genuine alternative strategy or tactic" that was "inherently in conflict with" (*United States* v. *Malpiedi*, 62 F.3d 465, 469 (CA2 1995)) Schlie's ongoing duties of loyalty and confidentiality to his former client. And this strategy was furthermore not merely "reasonable" (*Rubin* v. *Gee*, 292 F.3d 396, 401-02 (CA4), cert. denied, 123 S. Ct. 637 (2002)), but it undoubtedly was petitioner's greatest prospect for an acquittal.

In contrast to the Ninth Circuit's effort to cobble together from the trial transcript isolated instances in which Schlie did criticize Swan, courts applying the majority and intermediate rule recognize that "a cold record may not reveal the erosion of zeal that may ensue from divided loyalty," and the "*high impossible* task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone"; "[s]uch representation is invidious, often escaping detection on review, and is tantamount to the denial of counsel itself." *Perillo* v. *Johnson*, 205 F.3d 775, 806 n.13 (CA5 2000) (citing *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974); *Johnson* v. *Hopper*, 639 F.2d 236, 239 (CA5 1981); *United States* v. *Alvarez*, 580 F.2d 1251, 1256-57 (CA5 1978)). Thus, in *Church* v. *Sullivan*, 942 F.2d 1501, 1512 (CA10 1991) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 489 (1978)), the Tenth Circuit held that "the mere fact that cross-examination might appear 'vigorous' does not necessarily expunge this aspect of the constitutional error. Rather, the dangers inherent in successive and multiple representations

do not become apparent merely by scrutinizing what the attorney did: 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.'" The Eighth Circuit has expressly "agree[d] with" this conclusion in *Church* (*Dawan* v. *Lockhart*, 31 F.3d 718, 721 (1994)) and the Sixth Circuit has embraced *Church* as well (*Moss* v. *United States*, 323 F.3d 445 (2003)).

Those courts specifically recognize what the Ninth Circuit refused to acknowledge: that it is "difficult to envision circumstances more fraught with inherent conflict than where a lawyer must present a defense theory inculpating his former client, particularly where the former representation was factually intertwined with the criminal defendant's case." *United States* v. *Levy*, 25 F.3d 146, 151 (CA2 1994) (Newman, J.) (quoting *Church* v. *Sullivan*, 942 F.2d 1501, 1510-11 (CA10 1991)). "An attorney who cross-examines a former client inherently encounters divided loyalties. In these circumstances, counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the accused is thus counterpoised against solicitude for his client the witness." *Perillo* v. *Johnson*, 205 F.3d 775, 801-02 (CA5 2000) (citing *United States* v. *Voigt*, 89 F.3d 1050, 1078 (CA3 1996); *Lightbourne* v. *Dugger*, 829 F.2d 1012, 1023 (CA11 1987); *Stephens* v. *United States*, 595 F.2d 1066, 1070 (CA5 1979); *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974)). The Sixth Circuit thus recently recognized that "the probability of prejudice *dramatically increases* in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding. This probability reaches *near certainty* where, as here, the attorney's former and current clients collaborate to mount a defense." *Moss* v. *United States*, 323 F.3d 445, 462 (2003) (emphases added). See also *id.* (describing the "extreme likelihood of prejudice").

The "adverse effect" from a conflicting former representation is at its apex in a case like this one: where the

attorney is not merely called upon to examine the former client to whom the attorney owes duties of loyalty and confidentiality, but where the best prospect for the current client's acquittal is to *blame the former client*. A "strategy of shifting blame to one's codefendants is a legitimate and often effective defense strategy." *United States* v. *Mers*, 701 F.2d 1321, 1330 (CA11 1983). As this Court explained in a related context, "[i]n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is *especially important* that he be given the benefit of the undivided assistance of his counsel * * *." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942) (emphases added). *E.g.*, *United States* v. *Levy*, 25 F.3d 146, 156 (CA2 1994) (Newman, J.) (finding adverse effect when counsel "still possessed privileged information from his relationship with [former client] that was directly relevant to [current client's] defense. [Counsel's] continuing legal and ethical obligations to protect [former client] and his confidences necessarily meant that [counsel's] interests diverged from [current client's], especially since [current client's] most likely defense was to shift blame to [former client]"); *United States* v. *Romero*, 780 F.2d 981, 986 (CA11 1986) (defendant's "status as a low level employee made a shifting blame defense extremely feasible and * * * such a defense was completely foreclosed to him because it would have implicated his codefendant and another client of his attorney").

Schlie, however, was inescapably precluded from vigorously attacking Swan. Indeed, as noted, he entirely failed to do so in the opening statement or the first half of the trial, and only barely challenged Swan later in the case, no doubt because to do so would have been profoundly unethical. Swan would have been subject to criminal charges, and Schlie would have lost an enormous fee and been subject to disciplinary action. Courts applying the majority and intermediate rules find an "adverse effect" when, as in this

case, a viable strategy "would have highlighted the exposure of his former client, [Swan], to a perjury charge." *Dawan* v. *Lockhart*, 31 F.3d 718, 721 (CA8 1994). The lawyer in that circumstance must "choose between undermining the work product resulting from his prior representation * * * by exposing [the former client] to perjury charges and vigorously pursuing the impeachment of [the former client]." *Perillo* v. *Johnson*, 205 F.3d 775, 803 (CA5 2000). Similarly, other circuits hold that an adverse effect exists when (as in this case) aggressive cross-examination would involve the attorney "exposing himself to being called as a witness." *United States* v. *Levy*, 25 F.3d 146, 158 (CA2 1994). The Second Circuit thus found a Sixth Amendment violation when the attorney could have appeared as an adverse witness against the former client, who (as in this case) was a central witness and whose "credibility was essential to [the present client's] conviction." *United States* v. *Amorkliti*, 156 F.3d 150, 157 (1998).[3]

3. The contrary result that would be reached on these facts in circuits applying the majority or intermediate rule is best illustrated by *United States* v. *Malpiedi*, 62 F.3d 465 (CA2 1995). In that case, the Second Circuit considered a defendant's claim that his trial counsel had rendered constitutionally ineffective assistance because he had

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[3] The Ninth Circuit's assertion that Schlie was powerless to use privileged information against Swan only serves to highlight the conflict of interest. That view also conflicts with a recent decision of the highest court of the State of Maryland. In *Lettley* v. *State*, 746 A.2d 392, 402 (2000), the "State argue[d], and the trial judge ruled, that because counsel was ethically forbidden to use the confessing client's confidential information in defense of Appellant, and because no other lawyer would have had access to that confidential information, there was no conflict of interest." The Court "disagree[d]. The conflict is inherent in the divided loyalties. It mattered little that new counsel would not be privy to the confidential information known to Appellant's counsel; a conflict nonetheless existed."

previously represented an important government witness during an appearance before the grand jury that indicted the defendant. During that appearance, in which she testified as a custodian of records, the witness had falsely claimed that she did not recognize the defendant's handwriting, and she did not mention any tampering with the documents by the defendant. At trial, however, the witness testified that she saw the defendant altering documents. When defense counsel's cross-examination of the witness broached the topic of her first grand jury testimony in order to impeach her, the trial judge raised the issue of the witness's attorney-client privilege, and defense counsel eventually agreed to forgo cross-examination regarding the appearance.

After his conviction, the defendant filed a motion for a new trial on the basis of his trial attorney's conflict. Based on a series of findings, the trial judge denied the motion. The judge found that the trial attorney's testimony at the post-trial evidentiary hearing was "totally credible" and thus accepted the attorney's testimony that his decision not to cross-examine the witness about her first grand jury appearance was purely strategic. The judge also determined that the defendant had not been adversely affected by his attorney's conflict of interest, because his attorney's cross-examination of the witness was "over all, very effective" (62 F.3d at 468); the attorney was able to indirectly establish the inconsistency between the witness's grand jury and trial testimony (*id.*); the attorney impeached the witness with other, stronger evidence (*id.* at 468-69); and the attorney "established that [the witness] had lied in the second grand jury proceeding, rendering her lies in the first proceeding cumulative for purposes of impeaching her credibility" (*id.* at 469).

On appeal, the Second Circuit reversed. First, it found an actual conflict of interest because "[i]t was * * * in [the defendant's] best interest to have his attorney conduct a thorough, no-holds-barred cross-examination of" the government witness, but he was unable to cross-examine the witness regarding her first grand jury appearance "because of

his obligations as her prior attorney and her invocation of the attorney client privilege." 62 F.3d at 469.

The court of appeals emphasized that "'once the defendant establishes that there was an actual conflict, he need not prove prejudice, but simply that a "lapse in representation" resulted from the conflict.'" 62 F.3d at 469 (quoting *United States* v. *Iorizzo*, 786 F.2d 52, 58 (CA2 1986)). "To prove a lapse in representation," the panel explained, "a defendant must 'demonstrate that some plausible alternative defense strategy might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" *Id.* (quoting *United States* v. *Levy*, 25 F.3d 146, 157 (CA2 1994) (internal quotations omitted)). The court continued:

> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that "was inherently in conflict with" a plausible line of defense or attack on the prosecution's case. Once such a showing is made, *Strickland*'s "fairly rigid" presumption of prejudice applies.

Id.

Applying its two-part test to the facts before it, the court of appeals concluded that the conflict of interest of the defendant's trial counsel had caused a "lapse of representation" and thus adversely affected his representation of the defendant: "Cross-examination of [the witness] about testimony at her first grand jury appearance was a tactic that was entirely plausible but barred by [the attorney's] conflict of interest. * * * The foregone opportunity involved cross-examination regarding not only [the witness's] failure to give

the grand jury the damaging testimony she offered at trial, but also her perjury regarding [the defendant's] handwriting." *Id.* at 470.

Under the two-part test outlined by the Second Circuit in *Malpiedi*, petitioner unquestionably would have been entitled to a new trial because his trial counsel's actual conflict of interest caused a "lapse of representation" and thus adversely affected his representation of petitioner. Specifically, as even the Ninth Circuit acknowledged in petitioner's case, petitioner had a plausible alternative defense strategy – "laying the blame on Swan and portraying himself as the victim" (Pet. App. 13a) in a no-holds-barred, all-out assault on Swan throughout the trial – that might have been, but was not, pursued. That strategy was inherently in conflict with Schlie's duties to his former client, Swan; again, as the Ninth Circuit itself acknowledged, "[b]y shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan * * *." (*id.*). Equally significantly, as reflected in the panel's decision, an all-out, "blame Swan" strategy was neither "so insubstantial that even the most ardent and talented, conflict-free advocate would likely have avoided it" nor "so clearly against the defendant's interest that unconflicted counsel would never pursue it."[4]

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[4] The Seventh Circuit has embraced the *Malpiedi* analysis. In *Enoch* v. *Gramley*, 70 F.3d 1490, 1497 (1995), cert. denied, 519 U.S. 829 (1996), the Seventh Circuit endorsed *Malpiedi* as "a good example of what is meant by a substantial and particular relationship between the allegedly conflicting instances of representation." In *Malpiedi*, "the lawyer likely learned particular confidential information during his representation of her [in the grand jury proceedings] that tended to exculpate the defendant, or that was at least pertinent to impeaching her during the defendant's trial." *Id.*

Certiorari should be granted to resolve the three-way circuit split over the test for finding an "adverse effect" under *Cuyler* v. *Sullivan*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 24, 2003

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
KEITH SHWAYDER, MICHAEL G. SWAN, and KEVIN ORTON,
Defendants-Appellants.

Nos. 01-10156, 01-10176, 01-10186

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

December 5, 2002, Filed

COUNSEL: John D. Cline, Freedman, Boyd, Daniels, Hollander, Goldberg & Cline P.A., Albuquerque, New Mexico; Alan Ellis and Karen Landau, Law Offices of Alan Ellis, Sausalito, California; Douglass A. Mitchell, Dickerson, Dickerson, Consul & Pocker, Las Vegas, Nevada, for the defendant-appellants.

J. Gregory Damm and Bruce M. Bettigole, Office of the United States Attorney, Las Vegas, Nevada, and Kirby A. Heller, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

Before Hug, Jr. and Berzon, Circuit Judges, and Lasnik, District Judge.

OPINION

BERZON, Circuit Judge.

Keith Shwayder appeals his convictions for racketeering, RICO conspiracy, conspiracy, securities fraud, wire fraud, and money laundering. He argues that he was deprived of his Sixth Amendment right to effective assistance of counsel because his trial counsel had an actual conflict of interest.

Although there was such a conflict, Shwayder has not shown that the conflict adversely affected his counsel's representation.

Shwayder further contends that the prosecution asked his character witnesses guilt-assuming hypothetical questions, in violation of his right to due process. The prosecution's use of guilt-assuming hypothetical questions did constitute error, but this error did not affect Shwayder's substantial rights.

Lastly, Shwayder contends that the factual findings used to increase his base offense level for sentencing purposes should have been made by a jury rather than a judge. The law of this circuit is to the contrary.

Because none of these contentions warrants reversal or remand, we affirm Shwayder's convictions and sentence.[1]

I

BACKGROUND

A

The Conspiracy

Keith Shwayder was president of Teletek, Inc. ("Teletek"), a telephone sales and installation company listed on the NASDAQ stock exchange. Michael G. Swan contacted Shwayder about the possibility of merging Teletek with United Payphone ("UPAY"), a telephone company in which Swan had a controlling interest.

UPAY, traded on bulletin boards rather than a major stock exchange, was heavily in debt and in need of cash. Unlike bulletin-board-traded stock, NASDAQ-listed stock can be traded in large volumes, thereby generating substantial amounts of cash. Therefore Swan decided to pursue a merger with Teletek, a NASDAQ-listed company.

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[1] We are simultaneously filing a memorandum disposition addressing matters concerning co-defendants Orton and Swan in Nos. 01-10176 and 01-10186.

Shwayder agreed to merge Teletek with UPAY. In February 1992, Swan purchased a controlling interest in Teletek and became the chief executive and chairman of the Board of Directors of Teletek. Once he acquired Teletek, Swan entered into agreements with stockbrokers. Some of the agreements promised the stockbrokers cash payments by Teletek in exchange for promotion of UPAY and Teletek stock to their customers. Teletek would also issue its stock to the stockbrokers under Securities and Exchange Commission (SEC) Regulation S-8, which permits stock to be issued in exchange for consulting services. None of the stockbrokers receiving such stock provided consulting services for Teletek or UPAY. Instead, they principally issued and promoted Teletek stock, thereby generating cash for the companies through increased stock sales that in turn drove up the price of Teletek's shares. Shwayder signed several documents filed with the SEC representing that these stock issues were for consulting services.

Shwayder remained involved with Teletek for about nine months after the merger. He then resigned. At about the time that Shwayder left Teletek, Teletek issued stock to Prinfan, a company owned by Shwayder's business associate, Neil Feinstein. According to Shwayder: Feinstein received the stock in exchange for consulting services. Feinstein then loaned money back to Shwayder. Shwayder repaid the loan in part by providing consulting services to Prinfan, and Feinstein forgave the rest. The government's theory was that the consulting agreement with Feinstein, the stock issued to Prinfan, and the loan to Shwayder were all sham transactions designed to pay Shwayder substantial sums to leave Teletek.

For several years after Shwayder left Teletek, Swan continued paying bribes to induce brokers to sell Teletek stock. Ultimately, the price of Teletek collapsed and the company went bankrupt. Several investors were left with worthless stock or sold their Teletek stock at a significant loss.

Shwayder was named in a 110-count indictment charging him with racketeering in violation of 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy in violation of 18 U.S.C. § 371; securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a); wire fraud in violation of 18 U.S.C. § 1343; and money laundering in violation of 18 U.S.C. §§ 1956, 1957. The alleged racketeering conspiracy involved the commission of various illegal acts, including: bribing stock promoters and stock brokers to sell shares of UPAY and Teletek; fraudulently issuing shares of stock to entities controlled by the defendants; participating in insider trading; manipulating the volume and price of stocks; filing false financial reports and statements and other public documents; and concealing and laundering the illegal proceeds from the scheme.

B

Retention of Counsel

Before the indictment issued in November 1996, Shwayder sought representation from an attorney, John Schlie, regarding any legal proceedings that might arise out of Teletek's activities. When Shwayder asked Schlie to represent him, Schlie initially declined because of his prior representation of Swan.

Schlie had represented Swan from October 1994 to May 1995. The representation concerned a grand jury investigation of bribes Swan allegedly paid to stockbrokers who agreed to promote UPAY and Teletek stock. During the course of his representation Schlie had confidential communications with Swan regarding certain bribes that became part of the conduct charged in this case. In response to letters accusing Swan of bribing brokers, Schlie conducted an investigation on Swan's behalf, met with a prosecutor to discuss a grand jury investigation regarding the bribes, and learned of allegations that Swan had committed perjury during a SEC deposition by lying about bribing brokers. Swan repeatedly told Schlie that he had never bribed brokers.

Following Schlie's initial refusal, Shwayder persisted in attempting to retain him. Schlie ultimately agreed to represent Shwayder, after he obtained Swan's permission and both Swan and Shwayder signed waivers. Shwayder's waiver states: "Neither [Schlie] nor I am aware of any real conflicts of interest between my defense and that of Michael Swan." Swan's waiver states that Swan "did not, however, authorize the law firm to disclose any information subject to [his] attorney-client privilege."

C

The Trial

The joint trial of Shwayder, Swan and Kevin Orton, Teletek's accountant, lasted two months. The three defendants initially entered into a joint defense agreement. Almost one month into the trial, Swan pleaded guilty and agreed to testify for the prosecution. During trial, neither Schlie nor the prosecution informed the court of the conflict potentially posed by Schlie's prior representation of Swan.

Swan testified that he and other individuals had told Shwayder on several occasions of their bribery scheme. Swan also testified that Shwayder was present at meetings where agreements were made to bribe stockbrokers to sell Teletek stock and that Shwayder controlled a bank account that received illicit proceeds from the scheme.

Schlie cross-examined Swan on Shwayder's behalf. (Orton's counsel had already cross-examined Swan and vigorously attacked his credibility.) During cross-examination, Swan assented to Schlie's statement that Swan was somewhat of "a lone ranger," because he made deals and talked to people without communicating that information to others in the organization. Swan also agreed that "in a lot of circumstances" he would not tell Shwayder what was going on and admitted that he had told Shwayder that many of the issuances of stock were for legitimate purposes when they were not.

Schlie also asked questions designed to elicit the information that Swan was testifying as part of his plea agreement with the government; that his decision to plead guilty had reduced his sentence significantly; and that the government could later make a motion for downward departure to reduce his sentence further.

The government called 44 witnesses, including several of the stockbrokers who participated in the bribery scheme. Shwayder's former secretary, Annette Rosenberg, testified and implicated Shwayder in the scheme. The government also introduced a tape recording of a conversation in which Shwayder asked another participant how much of the money "he got to keep," and told that person how to explain a large payment received from Teletek.

Shwayder testified in his own defense. He maintained that he did not know the illegal purpose behind the acts in which he participated. To support this contention, Shwayder presented two character witnesses, both of whom gave positive opinions of Shwayder's honesty.

On cross-examination, the government questioned each of these witnesses regarding whether his opinion would change if Shwayder had committed certain acts alleged in the indictment. Shwayder's counsel never objected to the form of the questions. Character witness Jack Shaffer, a former director of Teletek, steadfastly answered these guilt-assuming questions with statements such as: "That does not match up with the man I know," "I don't think he would do something like that so I don't ... think it applies," "I can't believe that that's true," and "I just don't believe Mr. Shwayder would do anything like that."[2] The government asked similar questions

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[2] For example:

Q: Would it change your mind about whether Mr. Shwayder is an honest person if he lied in a certificate claiming he wasn't

of Shwayder's other character witness, Dr. James Sorensen, a business associate that Shwayder had known for 15 years.[3]

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working with anyone to get his Teletek stock sold when, in fact, he was working with all kinds of people to get his Teletek stock sold?

A: I don't believe he'd do that.

Q: But if he did would it change your opinion of him?

A: I believe anybody that lies ... if it's a serious thing then I think it's ... something to a person's detrimental character.

...

Q: Would it change your opinion if he signed off on official filings with the [SEC], documents that are intended for public investors to be able to view, about issuing millions of shares of Teletek stock for imaginary consulting? ...

A: I don't know anything about those kind of things, these are all conjectures kind of things. I don't think I'd change my mind about Mr. Shwayder because from what I know of him I believe him to be a totally honest person and ethical and above board.

[3] For example:

Q: Now, would it change your opinion ... if he lied about whether he was working in concert with other people to sell his Teletek stock, claiming that he wasn't working in concert with them, in fact, he was working with all sorts of people to get that stock sold? ...

A: Well, I think I would need to know more about the situation, have a better understanding of the facts. ... Well, if those are established facts, and I don't know that that's the case. I mean it's a hypothetical.

Q: Would it change your opinion ... if he signed off on official filings with the [SEC] to issue millions of shares of stock for imaginary consulting services? ...

A: Well, I would want to know more about how that came about, I mean whether or not he was fully informed. I mean it sounds like a complex transaction and if you have any delegation of duties or you're working with other people on something, people can put something in front of you and assert that it's something and you sign it and it turns out not to be what you thought it was.

In his closing argument, Schlie recalled Swan's testimony as follows:

> Who signs all the documents filed with the [SEC]? Michael Swan. Who makes all the decisions on funding with all these brokers? Michael Swan. ...
>
> And I asked him, "You would tell Mr. Shwayder that these things were for promotional services, consulting services, investment banking agreements?" "That's right." That's what he was telling Mr. Shwayder and he covered it with agreements that made the transactions, every one of them, look legitimate. There isn't one shred of evidence in his testimony or in this record that he told Keith Shwayder what was going on. ...

Q: Well, if Mr. Shwayder knew that the entities that were on this official form that he was signing hadn't really provided the consulting services, I want you to assume that much, and he goes right ahead and signs it that they had been, would that change your opinion ... ?

A: I would need to know more about the situation.

...

Q: Well, if he lied about the reason why the stock was to be issued and worked with the public company to have official documents filed with the SEC claiming falsely that Prinfan was providing consulting services for this stock, would that be enough information for you to decide whether to change your opinion?

A: Well, if Mr. Shwayder fully understood that, I mean, again we're back to a factual situation where -- was he knowledgeable of all this, did he know all of these things?

...

Q: If this jury convicts Mr. Shwayder of all of these crimes that he's charged with, will that change your opinion about his character?"

A: It would cause me to want to look more carefully at the evidence that they reviewed that led to that conviction.

> ... Keith Shwayder's a 60 year old man who never had legal problems before this. For nine months of his life he got involved with Michael Swan trying to do a business deal. Michael Swan abused that situation. Michael Swan lied to his wife. He lied to his lawyer. He lied to his friends. He lied to his business associates. He lied to Keith Shwayder. He lied to everyone. That's just the state of the evidence.

The jury convicted Shwayder of conspiracy, racketeering conspiracy, racketeering, money laundering, and some of the securities fraud and wire fraud counts. He was acquitted of two counts of wire fraud and one count of securities fraud.

D

Shwayder's Motion for A New Trial

After the trial, Shwayder retained new counsel and filed a motion for a new trial. The motion revealed Schlie's prior representation of Swan and contended that Schlie's presentation of Shwayder's case at trial was affected by an actual conflict. The district court ordered an evidentiary hearing on the motion.

At the hearing, Schlie testified that Swan had authorized him to use Swan's confidences in his representation of Shwayder, so long as they were not used to assist the government's case against Swan. Swan testified to the contrary -- that he did not give Schlie such authority but rather insisted that Schlie preserve his attorney-client confidentiality. Schlie's notes of a conversation among him, Swan, and Swan's new attorney state that he was permitted to talk to Shwayder as long as he did not breach Swan's attorney/client privilege. Swan's waiver form states, consistent with those notes, that it does "not authorize the law firm to disclose any information subject to my attorney-client privilege."

The decision to enter into a joint defense agreement, Schlie testified, was not affected by his prior representation of Swan. Rather, it was a result of Schlie's belief, based in part

on information gathered from mock jurors, that a finger-pointing strategy would not be successful in this case and that the best chance of acquittal for Shwayder and Orton was to acquit Swan. Schlie also testified that, in his view, nothing had changed regarding the conflict of interest issues once Swan pleaded guilty.

After the evidentiary hearing, the district court denied the motion for a new trial, stating:

> .... Shwayder has failed to demonstrate that Schlie's brief representation of co-Defendant Swan and subsequent representation of him created an actual conflict of interest. Indeed, the testimony of John Schlie, which the court finds entirely credible, indicates there was really nothing Schlie failed to do or did in representing Shwayder which was based on or effected [sic] by his prior representation of Swan. In short, the Court finds that the evidence presented failed to reveal that any theoretical conflict caused an adverse effect on Schlie's representation of Shwayder so as to warrant a new trial.

The district court granted Shwayder's motion to reconsider its ruling on the new trial motion so as to allow Shwayder to present testimony from Nathan Drage, the attorney who participated in conversations with Schlie and Swan regarding the conflict waiver. After hearing Drage's testimony, the district court again denied the motion, stating:

> Notwithstanding Defendant Shwayder's argument that the testimony of Co-Defendant Swan and Drage regarding the 1996 telephone conversation should be credited because they testified against their self interest, the Court maintains the view that the testimony of John Schlie regarding the 1996 conversation is the most credible version of the events occurring at that time. The Court's view of Mr. Schlie's credibility is reinforced by the opportunity the Court has had to interact with Mr.

Schlie in the course of pretrial and trial proceedings related to this case.

II
DISCUSSION
A
Shwayder's Right to Conflict-Free Counsel

Shwayder argues that his trial counsel's former representation of Swan created an actual conflict of interest. Schlie's continuing duties of loyalty and confidentiality to his former client Swan, Shwayder further maintains, adversely affected Schlie's representation by preventing Schlie from (i) pointing the finger at Swan as a culprit who used Shwayder for his own nefarious purposes without informing him of the illegal scheme; and (ii) from attacking Swan's credibility during cross-examination. We conclude that although there was indeed an actual conflict of interest, it did not adversely affect Schlie's representation.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel at trial. To establish a violation of this right, a defendant must ordinarily establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). However, "a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief." *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1243, 152 L. Ed. 2d 291 (2002) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980)).

1
Waiver of Conflict

We note at the outset that Shwayder's waiver of his conflict of interest was not valid. The waiver document stated that there was no conflict of interest, so it can hardly be read as waiving one. Also, the document was signed before the

indictment was issued and a few years before trial, so it could not have taken into account the actual scope of the case as it proceeded.

Furthermore, "for a waiver to be knowing and intelligent, the defendant must have been sufficiently informed of the consequences of his choice." *Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) (internal quotation marks and citation omitted); *see also id.* (citing *United States v. Agosto*, 675 F.2d 965, 976-77 (8th Cir. 1982) (holding waiver invalid when the defendant was informed of a possible conflict due to attorney's prior representation of co-defendant and told that a conflict may arise from prior confidential communications but not told that a valid conflict may result from continued loyalty to co-defendant)). Schlie never raised the conflict issue with Shwayder or the court after Swan's guilty plea altered the potential risks posed by Schlie's representation of Shwayder. In fact, Schlie testified that he never felt that there was a conflict issue that he needed to discuss with his client.

Because Shwayder was never adequately informed of the significance of the various conflicts that might arise from Schlie's former representation of Shwayder, Shwayder did not waive his right to conflict-free counsel. We therefore turn to the question whether there was an actual conflict and, if so, it affected Schlie's representation of Shwayder.

2

Actual Conflict

"In successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties." *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (internal quotation marks and citation omitted). One of the risks created by successive representation is "that the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination [of that client] for fear of misusing that confidential information." *Id.* The potential

for conflict is particularly acute when the two clients are co-defendants who allege different levels of culpability. *Id.*

Applying these standards, we conclude that there was an actual conflict of interest. Schlie represented Swan in matters that directly concerned bribing stockbrokers to sell Teletek stock. From the beginning of this litigation, Shwayder had an interest in laying the blame on Swan and portraying himself as the victim. The conflict between the two alleged coconspirators became greater when Swan agreed to plead guilty and testify against Shwayder for the prosecution. *See United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995). By shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan – or at least could have feared that he would appear to do so and therefore avoided certain areas of inquiry.[4]

3

Adverse Effect on Schlie's Representation of Shwayder

To show that an actual conflict had an adverse effect, the defendant must establish that it "affected the counsel's performance, as opposed to a mere theoretical division of loyalties." *Mickens*, 122 S. Ct. at 1243. The showing must be that "counsel was influenced in his basic strategic decisions by the interests [of the former client]," as where the conflict "prevents an attorney ... from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other," *Wheat v. United States*, 486 U.S. 153, 160, 100 L. Ed. 2d 140, 108 S. Ct. 1692 (1988).

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[4] The government contends that there was no actual conflict of interest because "there was unquestionably no further potential harm to Swan from any cross-examination which Schlie might have pursued." This assertion is not true. Swan had yet to be sentenced. Effective testimony could have affected his sentence through a substantial assistance departure. Conversely, if Swan lied on the stand, an obstruction of justice enhancement was a possibility.

Shwayder insists that there were such effects, including Schlie's failure to: blame Swan in the opening statement; establish on cross-examination that Swan was lying in order to procure a substantial assistance downward departure in sentencing; attack Swan's credibility vigorously on cross-examination; question Swan about lying to Schlie by telling him that the bribes were actually compensation for investment banking services; and impeach Swan's credibility with the lies that Swan had told Schlie about paying brokers to retail Teletek stock. The district court concluded, however, that Schlie credibly testified that his representation was not affected by the conflict. The court denied a new trial primarily on that ground.

Ordinarily, the district court's determinations of credibility, on conflict issues as on any other, should not be second-guessed. In particular, "the district judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witness testify, is in a far better position than we are to evaluate a charge of [conflict of interest]." *Burger v. Kemp*, 483 U.S. 776, 785, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987).[5] Yet, as we have had occasion to note, "the existence of a conflict of interest cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict."

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[5] At least some of Schlie's testimony -- that concerning the actual scope of the waiver -- was contradicted by his own notes, Swan's testimony and that of his attorney, Drage, and the waiver form itself. The district court did not note these contradictions. As we have determined that there was an actual conflict whatever Schlie may have believed and do not rely on Schlie's own perception regarding that conflict in evaluating its impact, we need not decide whether the district court's credibility determination is clearly erroneous.

Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994). Human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it. *See Malpiedi*, 62 F.3d at 470 ("after-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations.") Legal and judicial ethics rules so assume, banning lawyers and judges from taking on cases in certain conflict situations even if they are certain that the objective conflict will have no influence on them and are prepared to take every precaution to preclude such influence.

Nevertheless, evidence in the record independent of Schlie's testimony at the evidentiary hearing confirms that Schlie's conflict did not adversely affect his representation of Shwayder. Schlie carried out precisely the type of representation Shwayder maintained that his trial attorney could not and did not provide because of his conflict.

In his opening statement, Schlie emphasized that the trial would come down to knowledge and that the jurors would have to make their decisions on each individual defendant independently. Once Swan pleaded guilty, Schlie attempted to point the finger at Swan and to attack his credibility. Schlie cross-examined government witnesses and examined defense witnesses with questions directed at establishing that Swan alone was to blame. He asked about Swan's lies to Shwayder. While cross-examining Swan, Schlie elicited testimony that Swan never told Shwayder that he was paying off stockbrokers. Schlie also assured that the jury was aware that Swan would receive a much lower sentence by pleading guilty and that the government could further reduce his sentence.

Moreover, even if he was conscientious about preserving confidences, Schlie was not in fact ethically restricted from questioning Swan about most of the subjects on which they had prior confidential communications. Virtually all of that information was available, independent of any lawyer/client confidences, through the indictment, the trial testimony, and the evidence provided to the defense on discovery.

There was one fact not available from an independent source -- that Swan had lied to Schlie during his prior representation. It is impossible, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie's communications with Swan were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either. Schlie did, nevertheless, emphasize in closing that Swan had lied to everyone else, specifically mentioning "his [other] lawyer," as well as Shwayder.

We conclude that although Schlie had an actual conflict of interest, his former representation of Swan did not adversely affect his representation of Shwayder. We therefore affirm the district court's denial of Shwayder's motion for a new trial.

B

Use of Guilt-Assuming Hypotheticals to Cross-Examine Character Witnesses

Although he did not raise the point in the district court, Shwayder now argues that the prosecution's use of guilt-assuming hypotheticals during cross-examination of Shwayder's character witnesses constitutes reversible error. We review for plain error. *United States v. Antonakeas*, 255 F.3d 714, 727 (9th Cir. 2001). Under the plain error standard, relief is not warranted unless there has been "(1) error, (2) that was clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public

reputation of the judicial proceedings." *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999) (citation omitted).

I

Error

[1] Federal Rule of Evidence 405(a) allows the government to cross-examine character witnesses regarding their knowledge of specific instances of the defendant's misconduct. Fed. R. Evid. 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.") Such cross-examination helps the jury evaluate the quality of the character testimony.

[2] We have not yet addressed whether it is error for the prosecution to ask questions on cross-examination that assume the defendant's guilt of the precise acts for which he is on trial.[6] The reasons for why it is error were cogently stated by the Fourth Circuit:

> Character testimony in a criminal trial is admitted pursuant to Rule 405(a) of the Federal Rules of Evidence only as it may bear on the issue of guilt. Although an argument can be made that guilt-assuming hypothetical questions may be probative of the credibility of a non-expert witness, an opinion elicited by a question that assumes that the defendant is guilty can have only negligible probative value as it bears on the central issue of guilt.
>
> ...
>
> And, in addition to a proper application of the rules of evidence, adherence to a basic concept of our justice system, the presumption of innocence, is not served by this line of questioning.

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[6] We have noted the issue but found it unnecessary to decide. *United States v. Velasquez*, 980 F.2d 1275, 1277 (9th Cir. 1992).

United States v. Mason, 993 F.2d 406, 408-09 (4th Cir. 1993) (footnote omitted).

Following almost every other circuit that has addressed the question,[7] we now hold that the use of guilt assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process. The prosecution's use of guilt-assuming hypothetical questions on cross-examination of Shwayder's character witnesses therefore constituted error.

To be plain, however, an error must have been clear or obvious. *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). Neither the Supreme Court nor the Ninth Circuit

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[7] Several other circuits have forbidden use of such questions on due process and presumption of innocence grounds. *See United States v. Guzman*, 167 F.3d 1350, 1352 (11th Cir. 1999) ("The government may not ... pose hypothetical questions that assume the guilt of the accused in the very case at bar."); *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990) ("The jury might infer from the judge's permission to ask a guilt-based hypothetical question that the prosecutor has evidence of guilt beyond the evidence in the record."); *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir. 1984) ("It would be error to allow the prosecution to ask the character witness to assume defendant's guilt of the offenses for which he is then on trial."); *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984) (Guilt-assuming hypotheticals "allow[ ] the prosecution to foist its theory of the case repeatedly on the jury and to force an unsuspecting witness to speculate on the effect of a possible conviction."); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977) ("These hypothetical questions [strike] at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial."). Only the District of Columbia Circuit has held that witnesses testifying about their opinion of a defendant's character may be asked guilt-assuming hypothetical questions on cross-examination, but the court distinguished reputation witnesses, for whom such questions may be improper. *United States v. White*, 281 U.S. App. D.C. 39, 887 F.2d 267, 274-75 (D.C. Cir. 1989).

has previously addressed the guilt-assuming hypothetical question. The government contends that the error therefore was not plain.

It is, indeed, not clear that an error can be deemed "plain" in such circumstances. *See United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) ("We do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split." (internal quotation marks and citation omitted)). We need not decide, however, whether the near-unanimity among the other circuits distinguishes this case from *Thompson*. There are other reasons that there was no plain error -- the error did not affect Shwayder's substantial rights or "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings." *Vences*, 169 F.3d at 613.

2

Effect on Substantial Rights

[3] The prosecution's improper use of guilt-assuming hypothetical questions did not affect Shwayder's substantial rights. Both Shwayder's character witnesses declined to answer many of the hypothetical questions. Also, each of the character witnesses, when he did answer guilt-assuming questions, did so with statements expressing his disbelief that Shwayder would ever be capable of knowingly committing such acts, thereby bolstering rather than detracting from his positive opinion of the defendant's honesty.

[4] In a case where similar answers were provided by character witnesses, the Eleventh Circuit stated:

> The harm in allowing the use of this type of improper hypothetical lies in the effect of having the defendant's own character witness assume that the defendant is guilty. Here, the witness essentially refused to accept that assumption. The government's improper question backfired and, arguably, Guzman's case was strengthened by [the] response. It

> strains credulity to maintain that, in such context, the question attenuated the presumption of innocence to which Guzman was entitled.

Guzman, 167 F.3d at 1353-54.

The *Guzman* court went on to find it "clear beyond a reasonable doubt that the jury would have returned the same verdict if the question had not been asked." *Id.* at 1354. Similarly, here -- and even more clearly, as we are applying the plain error standard -- the prosecution's use of guilt-assuming hypotheticals did not affect Shwayder's substantial rights. The witnesses' answers negated any harm that may have been caused by the government's use of these questions. As a result, Shwayder has not established that the jury's verdict would have been different if the questions had not been asked.

Although Shwayder has not met the third prong of the plain error standard, we note that the error in this case also did not "seriously affect the fairness, integrity, or public reputation of the proceedings." Shwayder's attorney, having presumably prepared the character witnesses, may well have anticipated that they would answer the guilt-assuming hypotheticals in a manner favorable to the defense. His failure to object to the government's repeated questions may therefore have been a deliberate, tactical decision. Where such tactical behavior is likely, we should take great care before exercising our discretion to reverse for plain error.

[5] We therefore hold that asking character witnesses hypothetical questions that assume the defendant's guilt during cross-examination is error. Nevertheless, the error did not affect Shwayder's substantial rights and thus does not warrant reversal under the plain error standard.

C

Sentencing

In sentencing Shwayder, the district court enhanced the base offense levels under the United States Sentencing Guidelines for some of his convictions, such as those for

obstruction of justice, U.S.S.G. § 3C1.1, and money laundering, U.S.S.G. § 2S1.2. Shwayder argues that the district court erred under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), by making factual findings used to increase his base offense levels, rather than referring the factual questions to the jury. We reject this argument because "*Apprendi* does not alter the authority of the judge to sentence *within* the statutory range provided by Congress." *United States v. Buckland*, 289 F.3d 558, 570 (9th Cir. 2002) (en banc); *see also United States v. Johansson*, 249 F.3d 848, 861-62 (9th Cir. 2001).

III

CONCLUSION

Shwayder's trial counsel had an actual conflict of interest because of his prior representation of Shwayder's codefendant, but the conflict did not adversely affect the representation Shwayder received. Similarly, although the government's use of guilt-assuming hypothetical questions during its cross-examination of Shwayder's character witnesses violated due process, the error does not warrant reversal. Shwayder's sentencing was correctly determined. We therefore affirm Shwayder's convictions and sentence.

AFFIRMED.

UNITED STATES OF AMERICA,
Plaintiff
v.
KEITH SHWAYDER, et al.,
Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-96-288-PMP (RJJ)

Entered and Served
September 6, 2000

Before the Court for consideration is the Motion for New Trial (#359 and #360) filed on behalf of Defendant Keith Shwayder. Defendant Shwayder contends that because his trial counsel, John Schlie, Esq., previously represented co-Defendant Michael Swan, who in the midst of the trial of co-Defedant Shwayder, Swan and Orton, pled guilty and became a witness on behalf of the Government against co-Defendants Shwayder and Orton, an actual conflict of interest on the part of Mr. Schlie existed which adversely effected his performance on behalf of Defendant Shwayder.

In an Order entered March 17, 2000 (#391), this Court ruled that although Defendant Shwayder had failed in his motion to demonstrate that an actual conflict of interest exists, and if so, how such conflict adversely effected Schlie's trial performance on behalf of Shwayder, the Court deemed it appropriate to conduct an evidentiary hearing on Defendant Shwayder's Motion.

On May 26 and 31, 2000, the Court conducted an evidentiary hearing at which testimony was received from

Defendant Shwayder's trial counsel, John Schlie, Esq., co-Defendant Michael Swan, and moving Defendant Keith Shwayder. Post-hearing briefs were filed on behalf of Defendant Shwayder (#417) on June 19, 2000, and on behalf of Plaintiff United States (#429) on June 28, 2000.

Two days of evidentiary hearings have confirmed the view expressed by this Court in its Order (#391) entered March 17, 2000, that Shwayder has failed to demonstrate that an actual conflict on interest existed, and if so, how such conduct adversely effected Schlie's performance as Shwayder's trial counsel. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Specifically, Shwayder has failed to demonstrate that Schlie's brief representation of co-Defendant Swan and subsequent representation of him created an actual conflict of interest. Indeed, the testimony of John Schlie, which the Court finds entirely credible, indicates there was really nothing Schlie failed to do or did in representing Shwayder which was based on or effected by his prior representation of Swan. In short, the Court finds that the evidence presented fails to reveal that any theoretical conflict caused an adverse effect on Schlie's representation of Shwayder so as to warrant a new trial.

IT IS THEREFORE ORDERED that Defendant Shwayder's Motion for New Trial (#359 and #360) is denied.

DATED: September 5, 2000

Philip M. Pro
United States District Judge

UNITED STATES OF AMERICA,
Plaintiff
v.
KEITH SHWAYDER, et al.,
Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-96-288-PMP (RJJ)

Entered and Served
January 18, 2001

On February 11, 2000, Defendant Defendant (*sic*) Keith Shwayder filed a Motion for New Trial (#360). Following full briefing, evidentiary hearing and oral argument, the Court entered an Order (#445) on September 6, 2000, denying Defendant Shwayder's Motion for a New Trial.

On September 14, 2000, Defendant Shwayder filed a Motion to Re-Open Hearing on Motion for New Trial (#452). Defendant Shwayder's Motion to Re-Open was predicated on the declaration of Nathan Drage, Esq. (see Exhibit A to #452), which according to Defendant Shwayder contradicted the testimony of Shwayder's trial counsel, John Henry Schlie, Esq., concerning a telephone conversation among Schlie, Co-Defendant Michael Swan, and Nathan Drage which occurred in late August or early September 1996. Defendant Shwayder maintains that the declaration and proper testimony of Nathan Drage demonstrates that Schlie had a conflict of interest in representing Defendant Shwayder at trial as a result of his prior representation of Co-Defendant Michael Swan, which conflict Michael Swan never waived.

On January 12, 2001, the Court conducted an evidentiary hearing at which the testimony of Nathan Drage was presented. Notwithstanding Defendant Shwayder's argument that the testimony of Co-Defendant Swan and Drage regarding the 1996 telephone conversation should be credited because they testified against their self interest, the Court maintains the view that the testimony of John Schlie regarding the 1996 conversation is the most credible version of the events occurring at that time. The Court's view of Mr. Schlie's credibility is reinforced by the opportunity the Court has had to interact with Mr. Schlie in the course of pretrial and trial proceedings related to this case. Moreover, nothing presented in the testimony of Nathan Drage persuades this Court that the findings contained in the Order (#4455) entered September 6, 2000, denying Defendant Shwayder's Motion for New Trial should be modified.

IT IS THEREFORE ORDERED that Defendant Keith Shwayder's Motion to Reconsider New Trial Motion (#452) is denied.

Dated January 16, 2001

Philip M . Pro
United States District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
KEITH SHWAYDER, MICHAEL G. SWAN,
and KEVIN ORTON,
Defendants-Appellants.

Nos. 01-10156, 01-10176, 01-10186

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

February 24, 2003, Filed

PRIOR HISTORY: Appeal from the United States District Court for the District of Nevada. D.C. No. CR-96-00288-PMP/RJJ. Philip M. Pro, District Judge, Presiding.

COUNSEL: For United States of America, Plaintiff-Appellee (01-10156, 01-10176, 01-10186): J. Gregory Damm, AUSA, Las Vegas, NV. Bruce Bettigole, Esq., United States Attorney Special Assistant, Las Vegas, NV. Kirby A. Heller, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For Keith Shwayder, Defendant-Appellant (01-10156): John D. Cline, Freedman, Boyd, Daniels, Hollander, Goldberg, & Cline, Albuquerque, NM USA

For Michael G. Swan, Defendant-Appellant (01-10176): Dominic P. Gentile, Esq., Attorney at Law, Las Vegas, NV. Alan Ellie, Esq., LAW OFFICES OF ALAN ELLIS, Sausalito, CA.

For Kevin Orton, Defendant-Appellant (01-10186): Douglas P. Mitchell, Esq., Las Vegas, NV.

ORDER

The opinion of this court in the above-captioned case issued December 5, 2002, is amended as follows:

Slip Op. page 19, lines 11-23, change:

"There was one fact not available from an independent source—that Swan had lied to Schlie during his prior representation. It is difficult, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie would never have known that Swan lied to his former lawyer if he had not been that lawyer. As no other lawyer could have cross-examined Swan on that point, Schlie's representation was no different as to that point than it would have been without the conflict.

In any event, the omission regarding Swan's lies to Schlie had at most a negligible effect. Schlie emphasized in closing that Swan had lied to everyone else, specifically mentioning "his lawyer," as well as Shwayder."

to

"There was one fact not available from an independent source – that Swan had lied to Schlie during his prior representation. It is impossible, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie's communications with Swan were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either. Schlie did, nevertheless, emphasize in closing that Swan had lied to everyone else, specifically mentioning "his [other] lawyer," as well as Shwayder."

* * * * *

With these amendments, the panel has unanimously voted to deny appellant's petition for rehearing. Judge

Berzon has voted to deny the petition for rehearing en banc. Judges Hug and Lasnik recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is denied.

Appellant's motion for leave to file a reply in support of the petition for rehearing is denied as moot.

Supreme Court, U.S.
FILED
AUG 27 2003
OFFICE OF THE CLERK

No. 02-1866

In the Supreme Court of the United States

KEITH SHWAYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant's showing that an attorney had a conflict of interest that adversely affected the attorney's performance is sufficient to establish a Sixth Amendment violation when the conflict stems from representation of a former client.

2. Whether the court of appeals applied the correct legal standard for determining whether there was an adverse effect on performance arising from an attorney's conflict of interest.

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In the Supreme Court of the United States

No. 02-1866

KEITH SHWAYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a), as amended (Pet. App. 26a-28a), is reported at 312 F.3d 1109, as amended at 320 F.3d 889.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2002. A petition for rehearing was denied on February 24, 2003 (Pet. App. 26a-28a). On May 15, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 24, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of one count of racketeering, in violation of 18 U.S.C. 1962(c); one count of RICO conspiracy, in violation of 18 U.S.C. 1962(d); three counts of securities fraud, in violation of 15 U.S.C. 78j(b); two counts of wire fraud, in violation of 18 U.S.C. 1343; 13 counts of engaging in unlawful monetary transactions, in violation of 18 U.S.C. 1957; and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to 87 months' imprisonment, to be followed by three years of supervised release.

1. Petitioner was the president of Teletek, Inc., a telephone sales and installation company. Pet. App. 2a. Michael G. Swan contacted petitioner about the possibility of merging Teletek and United Payphone, a telephone company in which Swan had a controlling interest. *Ibid.* Petitioner agreed to the merger. *Id.* at 3a. Swan, petitioner, and co-defendant Kevin Orton (Teletek's accountant), engaged in a nationwide securities fraud scheme, pursuant to which they bribed stockbrokers to promote Teletek stock to unsuspecting public investors. Pet. App. 3a; Gov't C.A. Br. 4-5; Gov't Resp. Pet. Reh'g 1-2.

After the merger with United Payphone, petitioner remained with Teletek for approximately nine months. Pet. App. 3a. Working with an unscrupulous stock promoter, petitioner sold his personal holdings of Teletek stock at fraudulently inflated prices. Gov't C.A. Br. 4. As a result, petitioner realized more than $600,000 from the sale of his Teletek stock. *Id.* at 5. Eventually, the price of Teletek stock collapsed, the company went

bankrupt, and investors were left with worthless stock. Pet. App. 3a.

2. From October 1994 through May 1995, attorney John Schlie represented Swan in a grand jury investigation of bribes that Swan had paid to stockbrokers who promoted Teletek and United Payphone stock. Pet. App. 4a. Before petitioner was indicted in November 1996, he asked Schlie to represent him in legal proceedings arising from Teletek's activities. *Ibid.* Schlie ultimately agreed to represent petitioner after receiving from both Swan and petitioner written waivers of conflicts arising from Schlie's prior representation of Swan. *Id.* at 5a. Swan's waiver states that it does not authorize the disclosure of any information subject to the attorney-client privilege. *Ibid.*

At the beginning of their joint trial, petitioner, Swan, and Orton entered into a joint defense agreement. Pet. App. 5a. That agreement waived any potential conflict that might arise if one defendant ultimately decided to cooperate with the government. Gov't C.A. Br. 10. The agreement further specified that each defense attorney owed a duty of loyalty only to his individual client. *Ibid.*

In his opening statement, Schlie planted the seed for a defense in which Swan could be blamed for Teletek's illegal activities while petitioner remained ignorant of them. Gov't C.A. Br. 10. Schlie stated:

> And what you'll see is that this entire case boils down to knowledge. It boils down to knowledge, who knew exactly what it was was going on and what was told to them. Now as the Judge told you yesterday, you need to make your decision on each individual defendant independently, but the question is going to be knowledge.

Ibid.

Midway through the trial, Swan pleaded guilty and agreed to testify for the government. Pet. App. 5a. After Orton's counsel cross-examined Swan and vigorously attacked his credibility, Schlie cross-examined Swan on petitioner's behalf. *Ibid.* During Schlie's cross-examination, Swan admitted that often "he would not tell [petitioner] what was going on" and that "he had told [petitioner] that many of the issuances of stock were for legitimate purposes when they were not." *Ibid.* Schlie also elicited that Swan was testifying as part of a plea agreement with the government, that his decision to plead guilty reduced his sentence significantly, and that the government could move to have his sentence reduced even further. *Id.* at 6a.

During closing argument, Schlie blamed Swan for the fraudulent transactions and branded Swan a liar:

> Who signs all the documents filed with the [SEC]? Michael Swan. Who makes all the decisions on funding with all these brokers? Michael Swan. . . .
>
> And I asked him, "You would tell [petitioner] that these things were for promotional services, consulting services, investment banking agreements?" "That's right." That's what he was telling [petitioner] and he covered it with agreements that made the transactions, every one of them, look legitimate. There isn't one shred of evidence in his testimony or in this record that he told [petitioner] what was going on. . . .
>
> [Petitioner is] a 60 year old man who never had legal problems before this. For nine months of his life he got involved with Michael Swan trying to do a business deal. Michael Swan abused that situation. Michael Swan lied to his wife. He lied to his

> lawyer. He lied to his friends. He lied to his business associates. He lied to [petitioner]. He lied to everyone. That's just the state of the evidence.

Pet. App. 8a-9a (brackets in original). The jury found petitioner guilty on all but three of the counts against him. *Ibid.*

3. Petitioner retained new counsel and filed a motion for new trial. Pet. App. 9a. The motion revealed Schlie's prior representation of Swan and maintained that Schlie had an actual conflict of interest that affected petitioner's trial. *Ibid.* At an evidentiary hearing, Schlie testified that the decision to enter into a joint defense agreement initially was not affected by Schlie's prior representation of Swan, but by his "belief, based in part on information gathered from mock jurors, that a finger-pointing strategy would not be successful in this case and that the best chance of acquittal for petitioner and Orton was to acquit Swan." *Id.* at 9a-10a.

The district court denied petitioner's motion for a new trial. Pet. App. 22a-23a. The district court determined that petitioner had failed to demonstrate that there was an actual conflict of interest, or that the alleged conflict adversely affected Schlie's performance. *Id.* at 23a. The court explained that "there was really nothing Schlie failed to do or did in representing [petitioner] which was based on or [a]ffected by his prior representation of Swan." *Ibid.* Petitioner's motion for reconsideration was denied. *Id.* at 24a-25a.

4. The court of appeals affirmed. Pet. App. 1a-21a. See *Id.* at 26a-28a (amending opinion). The court first determined that petitioner's waiver of his attorney's conflict of interest was not valid. *Id.* at 11a-12a. The court of appeals also concluded that there was an actual

conflict of interest. *Id.* at 12a-13a. The court explained that "[b]y shifting the blame to Swan through cross-examination concerning matters on which [Schlie] had previously represented [Swan], Schlie could have breached his duty of loyalty to Swan—or at least could have feared that he would appear to do so and therefore avoided certain areas of inquiry." *Id.* at 13a.

The court of appeals concluded, however, "that although Schlie had an actual conflict of interest, his former representation of Swan did not adversely affect [Schlie's] representation of [petitioner]." Pet. App. 16a. The court held that "[t]o show that an actual conflict had an adverse effect, the defendant must establish that it 'affected the counsel's performance, as opposed to a mere theoretical division of loyalties.'" *Id.* at 13a (quoting *Mickens* v. *Taylor*, 535 U.S. 162, 171 (2002)). The court further explained that "[t]he showing must be that 'counsel was influenced in his basic strategic decisions by the interests [of the former client],' as where the conflict 'prevents an attorney . . . from arguing * * * the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing'" the other. *Ibid.* (brackets in original) (quoting *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981), and *Wheat* v. *United States*, 486 U.S. 153, 160 (1988) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978)). The court held that petitioner had failed to satisfy that standard, because "Schlie carried out precisely the type of representation [petitioner] maintained that his trial attorney could not and did not provide because of his conflict." *Id.* at 15a. The court explained that Schlie informed the jury in his opening statement that it should assess the guilt or innocence of each defendant independently, questioned witnesses with a goal of establishing that only Swan was to blame

for the crimes, elicited statements from Swan that he never told petitioner he was paying off stockbrokers, and made the jury aware that Swan would receive a much lower sentence by pleading guilty. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 12-15) that this case presents an opportunity to address a question left open by *Mickens* v. *Taylor*, 535 U.S. 162, 176 (2002): whether the rule in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), that a presumption of prejudice arises in joint representation cases in which an attorney has a conflict of interest that actually affects the adequacy of the attorney's performance, should be extended to cases of subsequent representation. See *Mickens*, 535 U.S. at 176. This case, however, does not present an appropriate vehicle for resolving that question.

In general, in order to establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), the Court established a less-demanding burden when the defendant alleges that ineffective assistance has been caused by a defense counsel's conflict of interest in representing multiple defendants concurrently. In that context, the defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350. Once that showing is made, "prejudice is presumed." *Strickland*, 466 U.S. at 692.

In the wake of *Sullivan*, many courts of appeals extended the *Sullivan* rule to cases in which the defendant alleged a conflict based on counsel's duties to

former clients. See *Mickens*, 535 U.S. at 174-175 (citing decisions). In *Mickens*, the Court averted to that line of cases and suggested that such an extension might not be warranted. *Ibid.* The Court explained that *Sullivan* had "stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id.* at 175. The Court also observed that "the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation." *Ibid.* The Court did not resolve that issue in *Mickens*, because the parties had presented the case to the Court on the assumption that *Sullivan* applied unless an even more lenient standard applied. *Id.* at 176. Thus, "[w]hether *Sullivan* should be extended to [successive representation] cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Ibid.*

This case similarly does not present an appropriate occasion to resolve that issue. Consistent with the way the case was presented to it, the court of appeals in this case applied *Sullivan*'s "adverse effect on performance" standard, rather *Strickland*'s "reasonable probability" of effect on the outcome standard, in deciding whether there was a Sixth Amendment violation in this case. The court ruled against petitioner on the ground that he failed to show that counsel's conflict adversely affected his performance. Pet. App. 16a.

The court of appeals' choice of the *Sullivan* standard, rather than the *Strickland* standard, operated to peti-

tioner's advantage. It is easier for a defendant to show that a conflict has adversely affected counsel's performance than it is to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Where, as here, a defendant fails to satisfy the *Sullivan* standard, it follows, *a fortiori*, that he cannot satisfy the more demanding *Strickland* standard. Because petitioner was not aggrieved by the court of appeals' selection of the *Sullivan* rather than the *Strickland* standard, petitioner has no basis for petitioning from that aspect of the decision.

Petitioner also errs in suggesting (Pet. 13) that there is a conflict between the decision below and the decisions in other circuits on whether *Sullivan* applies to successive representation cases. In *Moss* v. *United States*, 323 F.3d 445, 462 (2003), the Sixth Circuit held that the *Sullivan* rule applies when the successive representation involves a matter that is "nearly identical" to the prior representation. Because the court of appeals in this case and the Sixth Circuit both applied the *Sullivan* rule, rather than the *Strickland* rule, there is no conflict between the decisions warranting review.

Petitioner suggests that a conflict with *Moss* exists because the Ninth Circuit stated in a different case that it is "more difficult for a defendant to show that counsel actively represented conflicting interests in successive rather than simultaneous representation." Pet. 13 (quoting *United States* v. *Christakis*, 238 F.3d 1164, 1169 (9th Cir. 2001)). Since the Ninth Circuit did not make that observation in this case, its validity is not at issue here. In any event, the Sixth Circuit made precisely the same observation in *Moss*. 323 F.3d at 459.

The other two cases cited by petitioner (Pet. 13) did not even involve successive representation. In *United States* v. *Young*, 315 F.3d 911, 914-915 & n.4, cert. denied, 123 S. Ct. 2108 (2003), the Eighth Circuit applied the *Strickland* standard when a defendant alleged that his attorney had a conflict of interest because he shared office space with his co-defendant's attorney. In dicta, the Eight Circuit stated that the *Sullivan* standard applies to successive representation cases. *Id.* at 914 n.5. In *Rubin* v. *Gee*, 292 F.3d 396, 402-404 & n.2, cert. denied, 123 S. Ct. 637 (2002), the Fourth Circuit applied the *Sullivan* standard when two attorneys had a severe conflict of interest arising from their personal interest in avoiding criminal prosecution that caused them to fail to function as their client's advocates. Since neither case involved successive representation, neither conflicts with the decision in this case.

2. Petitioner next contends (Pet. 15-29) that this Court should grant review to resolve a circuit conflict on the proper standard for finding an adverse effect on performance under *Sullivan*. In particular, petitioner contends that the decision below conflicts with other decisions that apply some variation of the "alternative defense strategy" standard. Under those decisions, a defendant seeking to demonstrate an adverse effect must show that his attorney failed to pursue a "seemingly valid" or "reasonable" alternative strategy as a result of a conflict of interest. See Pet. 16-17 (citing decisions).*

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* Petitioner divides the alternative defense strategy decisions into two camps: those that examine whether there is a "seemingly valid" alternative defense strategy, and those that examine whether there is a "reasonable" alternative defense strategy. Pet. 16-17. The difference between the two is highly theoretical. It is difficult to imagine a seemingly valid, but unreasonable defense

For several reasons, review of petitioner's second question is not warranted. First, the court of appeals applied the correct legal standard for determining whether there is an adverse effect on performance; second, there is no necessary inconsistency between that standard and an alternative defense strategy standard; third, there is no post-*Mickens* conflict on the standard for determining adverse effect on performance; and fourth, the Ninth Circuit determined that petitioner's attorney pursued the very alternative defense strategy that petitioner suggested that counsel did not pursue because of his conflict.

a. The court of appeals in this case announced the correct standard for determining whether counsel's prior representation of Swan adversely affected his representation of petitioner. The court's holding that a defendant "must establish that [the conflict] 'affected the counsel's performance, as opposed to a mere theoretical division of loyalties'" repeats the formulation of the standard set forth in *Mickens*. Pet. App. 13a (quoting *Mickens*, 535 U.S. at 171). Similarly, the court of appeals' holding that "[t]he showing must be that 'counsel was influenced in his basic strategic decisions by the interests [of the former client]'" repeats the formulation of the standard set forth in *Wood*. *Ibid.* (quoting *Wood*, 450 U.S. at 272). Moreover, in *Mickens*, the Court equated the *Wood* standard with the *Sullivan* adverse effect standard. *Mickens*, 535 U.S. at 170-172.

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strategy; and it is equally difficult to imagine an invalid but reasonable defense strategy. Petitioner does not identify any case that turns on the difference between those two formulations of the alternative defense strategy test.

Petitioner suggests (Pet. 18) that the court of appeals incorrectly stated that a defendant must show that a conflict "prevents an attorney * * * from arguing * * * the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Ibid.* (quoting *Holloway*, 435 U.S. at 490). But the court of appeals gave that as one example of when a conflict adversely affects performance; it did not use that formulation as a description of the legal standard itself. *Ibid.* (introducing that example with the phrase "as where"). Moreover, that example tracks an example that this Court has given in two prior cases. See *Wheat*, 486 U.S. at 169; *Holloway*, 435 U.S. at 490. And while petitioner apparently objects (Pet. 17) to the use of the word "prevents" in the example, that is just another way of saying that the "conflict of interest actually affected the adequacy of [counsel's] representation." *Mickens*, 535 U.S. at 171 (quoting *Sullivan*, 446 U.S. at 349).

Petitioner also challenges (Pet. 17) a statement in a prior Ninth Circuit decision that an "adverse effect" is one that "significantly worsens counsel's representation." *United States* v. *Mett*, 65 F.3d 1531, 1535-1536 (9th Cir. 1995), cert. denied, 519 U.S. 870 (1996). The court of appeals, however, did not repeat that statement in this case. In any event, the *Mett* statement accurately anticipated this Court's statement in *Mickens* that the *Sullivan* standard is satisfied "only if the conflict has *significantly affected* counsel's performance —thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown." 535 U.S. at 173 (emphasis added).

b. While petitioner asserts that the Ninth Circuit's "basic strategic decisions" standard conflicts with the "alternative defense strategy test," there is no inherent

inconsistency between the two. Examining whether defense counsel failed to pursue an alternative defense strategy because of a conflict can simply be another way of asking whether counsel was influenced in his basic strategic decisions by the interests of his former client. Indeed, the Sixth Circuit and the Fourth Circuit have equated the two standards. *Moss*, 323 F.3d at 446; *Mickens* v. *Taylor*, 240 F.3d 348, 360-361 (4th Cir. 2001) (en banc), aff'd, 535 U.S. 162 (2002). No circuit has stated that its alternative defense strategy test is different from the "basic strategic decisions" standard articulated by the Ninth Circuit in this case.

c. In future cases, circuits that use an alternative-defense-strategy test can be expected to do so in a way that is consistent with *Mickens* and with the Ninth Circuit's decision in this case. *Mickens* clarified that a defendant must show that a conflict "significantly affected counsel's performance—thereby rendering the verdict unreliable." 535 U.S. at 173. Courts of appeals can be expected in the future to conform their alternative-defense-strategy tests to that standard, even if their pre-*Mickens* decisions were less demanding. Consistent with that expectation, the post-*Mickens* decisions cited by petitioner do not conflict with the decision below.

As discussed above, in *Moss*, the Sixth Circuit applied the same "basic strategic decisions" standard applied by the court in this case. And, like the court in this case, the *Moss* court found that defendant failed to show an adverse effect on performance under that standard. 323 F.3d at 471. In *United States* v. *Burgos-Chaparro*, 309 F.3d 50, 53 (2002), cert. denied, 123 S. Ct. 922 (2003), the First Circuit found that the defendant had failed to establish an adverse effect under the First Circuit's pre-*Mickens* decisions. It therefore did not

address whether *Mickens* required a modification of those decisions. *Ibid.* In *Armienti* v. *United States*, 313 F.3d 807, 811 (2002), the Second Circuit found that the defendant failed to show that his attorney had a conflict. It therefore did not reach the question whether the alleged conflict adversely affected counsel's performance. *Ibid.*

In *Rubin*, the only post-*Mickens* case to find a Sixth Amendment violation, the Fourth Circuit applied the "alternative defense strategy" standard from its decision in *Mickens*. 292 F.3d at 404. As noted above, the Fourth Circuit in *Mickens* equated that standard with the "basic strategic decisions" standard applied by the court of appeals in this case. Moreover, the findings in *Rubin* demonstrate that the standard applied by the Ninth Circuit was satisfied. In *Rubin*, the only issue at defendant's trial for murder was premeditation and deliberation, and two of defendant's attorneys failed to take the stand to testify that they instructed the defendant to make the shooting look more premeditated and more deliberate. 292 F.3d at 405-406. The Fourth Circuit explained that:

> [the attorneys'] conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system.

Id. at 406. Accordingly, none of the post-*Mickens* cases cited by petitioner conflicts with the decision below.

d. Finally, while the Ninth Circuit did not use the phrase "alternative defense strategy," it carefully examined petitioner's claim that defense counsel failed

to pursue an alternative defense strategy because of his conflict of interest, and rejected that claim on the merits. The court specifically found that petitioner's counsel "carried out precisely" the type of blame-Swan defense that petitioner "maintained that his trial attorney could not and did not provide because of his conflict." Pet. App. 15a. Petitioner argues (Pet. 19-21) that the court erred in reaching that conclusion. But the record amply supports the court of appeals' determination. In particular, petitioner's attorney informed the jury in his opening statement that it should assess the guilt or innocence of each defendant independently; he sought to establish through the questioning of witnesses that only Swan was to blame for the crimes; he elicited statements from Swan that Swan withheld information from petitioner about the crimes; he made the jury aware that Swan would receive a much lower sentence by pleading guilty; and he gave a summation that blamed Swan for the fraudulent transactions and branded Swan a liar. In any event, petitioner's fact-bound challenge to the court of appeals' assessment of the strategy pursued by petitioner's counsel does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case, more so than all but a handful of cert. petitions, cries out for resolution by the Supreme Court. It presents one question that has been flagged by this Court as meriting review and another that has been recognized as the subject of a square circuit conflict by federal and state courts and commentators. These questions, furthermore, present important and frequently recurring issues of federal constitutional law governing the conduct of counsel in criminal proceedings, and thus directly implicate the Court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat* v. *United States*, 486 U.S. 153, 160 (1988). Conflicts of interest of the sort presented here "have arisen in numerous cases throughout the country and are likely to continue to occur at a significant rate." Ethics Experts Br. 5. These facts present a "prototypical case" of the conflict that ensues when an attorney's former client takes the stand against his present client, presenting the attorney with the "impossible choice" of betraying his loyalty to one or the other. *United States* v. *Almeida*, No. 01-11553, 2003 U.S. App. LEXIS 16862, at *14 (CA11 Aug. 18, 2003) (published opinion).

The undisputed facts of the case are well developed and particularly egregious, providing an ideal vehicle for resolving the questions presented. Petitioner was convicted and sentenced to more than seven years in prison based principally on the testimony of a witness, Michael Swan, who had previously been represented by petitioner's own counsel.[1] Counsel's representation of both clients involved criminal proceedings regarding the same bribery scheme. Not even the government disputes that Swan was at the heart of all the criminal activity in this case, yet petitioner's counsel, faced with his continuing

---

[1] In support of the convictions, the government cites to its own briefs on appeal (see BIO 2-3), no doubt because the principal *evidence* against petitioner was the testimony of the former client at the heart of the conflict of interest in this case.

duties to Swan, entered into a joint defense agreement with his former client rather than attacking him. Throughout the opening statement and the government's presentation of its case, petitioner's counsel did not utter a single word designed to place responsibility where it belonged – on Swan – or otherwise attempt to undermine Swan's credibility. The sole sentence which the government – like the court below – cites to the contrary does not even *remotely* allude to Swan's responsibility: "Now as the Judge told you yesterday, you need to make your decision on each individual defendant independently, but the question is going to be knowledge." BIO 3 (quoting counsel's opening statement). Only midway through the trial, after Swan entered a guilty plea and agreed to testify against petitioner, did petitioner's counsel even broach the issue of Swan's responsibility. And the jury could not have regarded that meager effort –on the heels of extensive proceedings in which petitioner's counsel had insisted on Swan's innocence – as anything but desperation.

Two issues arise on these facts. The first is the fundamental issue that *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1245-46 (2002), explained "remains * * * an open question": to what extent the "adverse effect" standard of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), applies to cases of successive representation. The Ninth Circuit requires a more rigorous showing for defendants alleging conflicts of interest in cases of successive representation (*United States* v. *Christakis*, 238 F.3d 1163, 1169 (2001)), while several other circuits have continued, post-*Mickens*, to apply the *Sullivan* standard to all cases of successive representation. See Pet. 13. Petitioner, by contrast, urges this Court to adopt the middle position held by the Sixth Circuit: that the *Sullivan* standard applies in cases of successive representation so long as the current and prior matters are closely related. See, *e.g.*, *Moss* v. *United States*, 323 F.3d 445, 462 (CA6 2003).

Second, this Court should use this case to resolve the widely acknowledged split in circuit authority over the meaning of the *Sullivan* "adverse effect" standard. Although the government alleges that the various standards applied by the

circuits are in theory reconcilable, the case law described in the petition for certiorari (and *infra* at 5-10) clearly demonstrates that in practice, they are very different. To determine that no "adverse effect" took place, the Ninth Circuit demands only the roughest "basic" similarity between counsel's actual strategy and the alternate strategy he could have pursued – *i.e.*, that counsel pursued the same general "type of representation." In this case, given counsel's outrageous failure to attack the main witness against his client until it was far too late to have a chance of persuading the jury, the Ninth Circuit's conclusion that counsel "carried out precisely the type of representation Shwayder maintained" that he failed to provide is insupportable – and demonstrates the tremendous weakness of its highly subjective "basic strategic decisions" test in comparison to the scrutiny of counsel's performance undertaken by the majority of circuits under the "alternative defense strategy" test. Only the majority rule provides criminal defendants with a meaningful guarantee of unconflicted representation, and this Court should endorse it here.

Certiorari accordingly should be granted.

I. This Case Is An Ideal Vehicle To Decide The Extent To Which The *Sullivan* Standard Applies In Cases Of Successive Representation.

The government does not deny that in *Mickens*, this Court identified as open, and suggested that it would in an appropriate case decide, the question to what extent *Sullivan*'s "adverse effect" standard, rather than *Strickland*'s "prejudice" requirement, applies in cases of "successive" representation. Nor does it contest that this issue ought to be decided. Instead, the government contends only that this case "does not present an appropriate vehicle for resolving that question" (BIO 7): "[b]ecause petitioner was not aggrieved by the court of appeals' selection of the *Sullivan* rather than the *Strickland* standard, petitioner has no basis for petitioning from that aspect of the decision" (*id.* 9). That argument is doubly wrong.

First, the first question presented does not involve a stark choice between clearly defined standards announced in *Sullivan*

and *Strickland*. The test required by *Sullivan* is the subject of substantial disagreement in the lower courts. See *infra* at 5-10. In the Ninth Circuit (unlike some other circuits (see Pet. 13)), it is settled that a more rigorous showing is required under *Sullivan* in successive representation cases (see *Christakis*, 238 F.3d at 1169), a conclusion it recently re-affirmed in *Belmontes* v. *Woodford*, 335 F.3d 1024, 1048 (2003). Because petitioner contends that the Ninth Circuit applied an unduly rigorous standard, the petition properly raises the question "[w]hether *and to what extent* the presumption of prejudice from conflicting representation adopted in [*Sullivan*] applies in cases of successive representation." Pet. i (emphasis added).

Second, and independently, there is no question of petitioner's "standing" to raise this issue. This is not a case in which the petition seeks review of a claim on which the petitioner prevailed below. If the court of appeals had granted petitioner relief on an unrelated issue – such as his sentencing – he would have no standing to seek further review of that question. But in this case, the first question presented simply identifies an issue that this Court must necessarily resolve in the course of addressing petitioner's Sixth Amendment claim. Put another way, even if petitioner had not labeled the issue as a separate "question," it would properly be before the Court, not least because the government would be able to defend the judgment on the ground that *Sullivan* is inapposite to cases of successive representation.

This is furthermore an ideal case in which to resolve the issue identified by this Court in *Mickens* through a balanced holding that recognizes the grave dangers of attorney conflicts in certain specific circumstances. Neither the court of appeals nor the government disputes that petitioner's counsel labored under serious conflicts because he had represented Swan in a *very closely related* matter. The attorney had served as counsel to Swan not merely "in legal proceedings arising from Teletek's activities" (BIO 3), but in grand jury proceedings in which Swan was being investigated for the identical bribery scheme for which he was charged and confessed his guilt in this case. When, as here, the conflict is stark and experience teaches that

its adverse effects on the current client's representation are apt to be severe, *Sullivan*'s "adverse effect" standard logically applies. See Pet. 13-15.

II. This Case Squarely Presents The Recurring Conflict Over The Meaning Of The "Adverse Effect" Requirement Of *Cuyler* v. *Sullivan*.

1. The widely acknowledged "split in circuit authority" (*Quinones* v. *Miller*, No. 01-Civ-10752, 2003 U.S. Dist. LEXIS 9176, at *122 (S.D.N.Y. June 3, 2003) (report and recommendation)) and state court decisions over the test for determining when an attorney conflict of interest causes an "adverse effect" on the client's representation is widely recognized, firmly entrenched, and outcome determinative here. The petition and *amicus* briefs collect federal and state court decisions and commentary recognizing that this Court's rulings are "rather vague" (*Beets* v. *Collins*, 65 F.3d 1258, 1265 (CA5 1995) (en banc)) and that as a consequence the lower courts long "have been confused about the test to apply" (*State* v. *Jenkins*, 715 P.2d 716, 719 (Ariz. 1986)). See Pet. 15; see also *Burger* v. *Kemp*, 483 U.S. 776, 799 n.6 (1987) (Blackmun, J., dissenting) ("The distinction between a prejudice showing and a showing of adverse effect on an attorney's performance apparently has been difficult for some courts to discern."), *cited in* NACDL Br. 14; *Skinner* v. *Duncan*, No. 01-Civ.-6656, 2003 U.S. Dist. LEXIS 10102, at *169 (S.D.N.Y. June 17, 2003) (report and recommendation) (expressly recognizing that the federal courts of appeals are "split"). The Ninth Circuit's decision here is reflective of the minority of "circuit court decisions [that] seem to apply the *Strickland* standard of deferring to counsel's 'trial strategy' rather than applying *Sullivan*'s 'adverse effect' standard," an approach that "seems plainly contrary to Supreme Court precedent, as it would eviscerate the less deferential standard announced by the Supreme Court in *Cuyler* v. *Sullivan*." *Skinner*, 2003 U.S. Dist. LEXIS 10102, at *168 n.80 (report and recommendation) (emphasis added).

In the face of this clear circuit split, the government merely retorts weakly that there is "no *inherent* conflict" or "*necessary*

inconsistency" (BIO 11, 13 (emphases added)) between the "alternative defense strategy" and "basic strategic decisions" tests applied by the various circuits. This assertion is unfounded. It is no answer that here – as in so many cases in which the Court grants certiorari – the terminology the courts use to describe the tests may be reconcilable in theory because a choice between alternative defense strategies "can" on some facts amount to a basic strategic decision. BIO 13. The critical point is that the standards mean very different things in practice. As the opening brief made clear, this difference is vividly illustrated by the contrast between the Second Circuit's approach in *United States* v. *Malpiedi*, 62 F.3d 465 (1995), and that of the Ninth Circuit in its opinion below.[2]

The facts in *Malpiedi* were very similar to those of this case. A government witness against the defendant had been accompanied by defendant's trial counsel to her appearance more than a year earlier in grand jury proceedings. The Second Circuit held that because counsel could have, but did not, cross-examine the government witness about certain inconsistencies in her grand jury testimony, there existed a plausible alternative defense strategy that conflicted with counsel's ethical duties to the witness (with whom, the court found, counsel had had an attorney-client relationship). *Id.* at 470.

---

[2] The Second Circuit has recently reaffirmed its "relatively low" standard: "a defendant represented by conflicted counsel need not demonstrate that the alternative strategy or tactic foregone by counsel was reasonable. Rather, the defendant need only prove that the alternative strategy was plausible." *United States* v. *Feyrer*, 333 F.3d 110, 118 (2003). The question is whether "some plausible alternative defense strategy or tactic might have been pursued," such that the defendant need merely show "only that '[the tactic] possessed sufficient substance to be a viable alternative." *Id.* at 116. It remains clear in the Ninth Circuit, by contrast, that the showing of adverse effect in that circuit is a "*substantial* hurdle," for it "must be one that *significantly worsens* counsel's representation of the client." *Plancarte* v. *Plummer*, No. C-02-5132, 2003 U.S. Dist. LEXIS 14473, at *18 (N.D. Cal. Aug. 13, 2003) (emphases added).

In reaching this decision, the court of appeals disregarded the trial court's findings that counsel's cross-examination of the witness was "overall, very effective," that counsel had impeached her credibility with other, stronger evidence, that he had "indirectly" established the conflicts with her grand jury testimony, and that the testimony he failed to elicit would have been merely cumulative of other evidence of her lies. *Id.* at 468-69, 470. The court found that all these factors – which go to whether counsel would have or should have cross-examined the witness about the grand jury testimony absent his conflict of interest – were irrelevant to the question of whether a plausible alternative strategy (*i.e.*, asking her those questions) was available. The court explained:

> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. * * * The test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. * * * Counsel's inability to make such a conflict-free decision is itself a lapse in representation.

Id. at 469. The court also found that the attorney's cross-examination of the witness was hampered by his inability to reveal communications between himself and the witness due to his duty to respect the attorney-client privilege. *Id.*

The contrast between this analysis and that of the Ninth Circuit below could not be more stark. If anything, petitioner's case is substantially stronger than that of Malpiedi. Here, not only was attacking Swan a plausible alternative strategy or tactic, Swan was the centerpiece of the government's case; blaming Swan was essentially the only defense strategy that had any chance of succeeding; and yet counsel (who had represented the witness for many months rather than merely accompanying him to one previous hearing) utterly failed to do so until the eleventh hour. Yet the Ninth Circuit maintained that this last-

ditch strategy of desperation amounted to "precisely the type of representation" petitioner would have received if his counsel had been pinning the blame on Swan all along. Pet. 15a. Under the *Malpiedi* analysis, this result is incomprehensible. Clearly, petitioner's counsel was unable to make "a conflict-free decision" as to whether to blame Swan at the time that he made his opening statement and cross-examined Swan; this itself, under *Malpiedi*, amounts to an "adverse effect" on petitioner's representation. The Ninth Circuit also conceded that petitioner's counsel failed to elicit the fact that Swan had lied to counsel during his prior representation, but dismissed this fact as irrelevant because no other lawyer would have been able to elicit this information either – a result inconsistent with *Malpiedi*'s treatment of counsel's inability to seek privileged information as an aspect of his conflict of interest.

Amici also identify a second, closely related circuit conflict that would be resolved by this case. See NACDL Br. 16-18, Ethics Experts Br. 9-12. This split relates to the defendant's burden of proof: several courts of appeals require a defendant to prove that his counsel's conduct "would have been" different (*United States* v. *Burgos-Chaparro*, 309 F.3d 50, 53 (CA1 2002)) but for the existence of the conflict of interest. See NACDL Br. 16 (listing circuits imposing a "proximate cause" requirement). Other circuits have recognized, however, the near impossibility of establishing how unconflicted counsel would have performed, and do not require the defendant to show "that, but for the conflict, counsel's conduct of the trial would have been different." *Malpiedi*, 62 F.3d at 469; see also, *e.g.*, *Rubin* v. *Gee*, 292 F.3d 396, 404 (CA4 2002) (requiring only the existence of a reasonable alternative strategy that counsel "*might have* pursued" (emphasis added)). These courts recognize that counsel's "inability to make * * * a conflict-free decision is itself a lapse in representation." *Malpiedi*, 62 F.3d at 469. This latter approach is far more consistent with this Court's repeated warnings against "unguided speculation" in conflict-of-interest cases (*Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978) (noting that the effect of a conflict on an attorney's conduct is "virtually impossible" to measure); accord *Strickland* v. *Washington*, 466

U.S. 668, 692 (1984)), and this Court should take advantage of this opportunity to adopt it.

2. Because the conflict is clear, the government hopes to avoid review on the ground that *Mickens* v. *Taylor*, 535 U.S. 162 (2002), will bring the circuits into line. In particular, the government points to dictum in *Mickens* stating that *Sullivan*'s "adverse effect" test is satisfied "if the conflict has significantly affected counsel's performance." *Id.* at 173. But no circuit prior to *Mickens* applied an "*in*significant effect" test, and the government never explains how *Mickens* could be read to change the lower courts' settled precedents.

The government's contention that *Mickens* will change the law is moreover a testable proposition, and it is demonstrably incorrect. In *Mickens*, this Court did not grant certiorari on, receive briefing and argument regarding, or (most importantly) *decide* the meaning of *Sullivan*'s "adverse effect" standard. Rather, the narrow question was whether *Sullivan* – as opposed to a rule of automatic reversal – applies when a trial court fails to conduct an inquiry into a conflict about which it knew or should have known. This Court specifically cautioned against reading its decision more broadly. 535 U.S. at 174 ("Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown.").

The lower courts have correctly heeded this Court's admonition, and while numerous attorney conflict cases have been decided subsequent to *Mickens*, no court – state or federal – has read this Court's ruling to affect its prior precedent on the question presented by this case. *Mickens* has been cited in eighty-seven federal court rulings, thirty-nine state court rulings, twenty-five law review articles, and two treatises. In all this extensive study and application of *Mickens*, there has not been a single instance in which that decision has been read to change the legal standard. The few cases that even cite the "significantly affected" phrase from *Mickens* rightly regard it as interchangeable with *Sullivan*'s "adversely affected" standard. See, *e.g.*, *Thomas* v. *Sims*, No. 02-2494, 2003 U.S. App. LEXIS

17932 (CA7 Aug. 25, 2003); *Skinner* v. *Duncan*, No. 01-Civ.-6656, 2003 U.S. Dist. LEXIS 10102, at *150-51 (S.D.N.Y. June 17, 2003); *Quinones* v. *Miller*, No. 01-Civ.-10752, 2003 U.S. Dist. LEXIS 9176, at *92 (S.D.N.Y. June 3, 2003). And subsequent to *Mickens*, a further nineteen decisions have applied the "alternative defense strategy" standard without citing *Mickens* at all. (This data also confirms that the questions presented arise with great frequency.)

Respondent attempts to preempt this onslaught of authority by speculating that it has not been necessary to address the implication of *Mickens* because the courts have not yet found Sixth Amendment violations under their prior tests. That is not so; recent decisions have vacated convictions under *Sullivan* on the basis of an "adverse effect" from attorney conflicts, applying their prior precedent without reading *Mickens* to change the law at all. *Rubin* v. *Gee*, 292 F.3d 396, 404 (CA4 2002); *Eisemann* v. *Herbert*, No. 99-CV-2826, 2003 U.S. Dist. LEXIS 13222 (E.D.N.Y. July 31, 2003); *State* v. *Mohrman*, C.A. No. 02CA008053, 2002 Ohio 6610 (Ohio Ct. App. Dec. 4, 2002).[3]

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari, certiorari should be granted.

---

[3] *Mickens* furthermore rejected the argument that this Court in *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981), intended to limit an "adverse effect" to circumstances in which "counsel was influenced in his basic strategic decisions." Contra BIO 11. As *Mickens* explains, this language specifically represents the *Wood* Court's "description of why it could not decide the case without a remand." 535 U.S. at 172. *Mickens* then rejected the argument that *Wood* lowered the bar for establishing a Sixth Amendment violation. This Court's reasoning in *Mickens* is equally applicable to respondent's equally insupportable claim that the Court in *Wood* purported to *raise* the bar: "The notion that *Wood* created a new rule *sub silentio* – and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the conflict-of-interest issue – *is implausible*." *Id.* (emphasis added).

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in defending standards of professional advocacy and upholding the constitutional commitment to the effective assistance of counsel. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000).

SUMMARY OF ARGUMENT

1. The duties of loyalty and confidentiality are the backbone of the lawyer-client relationship. When they are compromised, a defendant is left without a single-minded advocate of his own, and there can be no assurance that the prosecution's case has been subjected to the "meaningful adversarial testing" required by the Sixth Amendment. *See United States v. Cronic*, 466 U.S. 648, 656 (1984). This is a case in

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, or its counsel contributed monetarily to the brief.

point. Petitioner Keith Shwayder was saddled with a lawyer whose conflicting duties precluded him from pursuing the strategy best for his client, depriving Shwayder of the zealous advocacy to which he was entitled.

2. As this Court has recognized, identifying the precise effect of a breach of the duty of loyalty on the outcome of a trial is difficult or impossible. *See Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). Accordingly, the Court has established a prophylactic rule that presumes prejudice when an actual conflict of interest is established. *Id.*; *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). The lower courts, however, have failed to reach consensus on how that standard is to be applied. And as a practical matter, a rule intended to relieve defendants of the burden of proving prejudice has become, at least in some circuit courts, indistinguishable from – or even more demanding than – the prejudice inquiry undertaken in standard ineffective assistance cases. The confusion in the lower courts has led to results that cannot be reconciled with this Court's case law, and warrants the Court's immediate review.

ARGUMENT

Keith Shwayder relied on his attorney, John Schlie, to devote his full energies to Shwayder's defense, unconstrained by competing interests. Schlie betrayed that trust, and in so doing, deprived petitioner of his Sixth Amendment right to effective assistance of counsel.

I. SCHLIE'S CONFLICT OF INTEREST WAS ACTUAL AND APPARENT FROM THE OUTSET.

The basic facts of this case are straightforward and egregious. Petitioner had a brief but ill-fated business relationship with Michael Swan during which Swan used him to advance his own interests. Petitioner was a successful businessman who had owned Teletek, a NASDAQ-listed company, for over ten years when he met Swan. Swan, on the

other hand, was engaged in a nationwide bribery scheme, paying stockbrokers around the country to sell stock in his company, United Payphone, to their clients in order to inflate stock prices. In order to raise additional money for his company, Swan wanted to obtain a NASDAQ listing by merging with a listed company. He approached petitioner – who he had not met before – and proposed a merger between their companies for the sole purpose of obtaining that listing. Swan never told Shwayder, either before or after the merger, about his bribery scheme.

Following the merger, Swan replaced Shwayder as chief executive officer and chairman of the board of directors of Teletek, and assumed nearly complete control of the company's operations. Having accomplished his purpose, Swan no longer had any use for Shwayder, and Shwayder resigned from Teletek eight months after the merger.

Eventually, Swan's activities came to the attention of the grand jury in Las Vegas. Attorney John Schlie represented Swan during an eight-month period in which he was under investigation by the grand jury. That investigation ultimately led to charges against both Swan and petitioner. The best defense for petitioner, who knew nothing about Swan's wrongdoing, was plainly to point the finger of blame at Swan. Nevertheless, Schlie, despite his representation of Swan, agreed to represent petitioner in defending against the government's charges. And notwithstanding the obvious competing interests involved, Schlie entered a joint defense agreement with Swan's new counsel.

It was evident from the outset that Schlie's representation of petitioner, after previously representing his co-defendant in the pre-indictment phase of the same proceeding, constituted a prohibited conflict of interest. The conflict was only exacerbated when, midway through trial, Swan pled guilty and testified against petitioner. Schlie now had to cross-examine and challenge the veracity of his own former client.

At no time did Schlie notify the court of his prior representation of Swan.

The conflicts of interest that permeated Schlie's representation of petitioner were not speculative or subtle. To the contrary, they were actual, obvious and avoidable from the outset. Nevertheless, the Court of Appeals found that there had been no violation of petitioner's Sixth Amendment right to conflict-free representation. It did so in reliance on a minority test that is inconsistent with this Court's precedents and out-of-step with the standards being employed by most other courts. The gravity of the ethical violations in this case and the disagreement in the lower courts merit this Court's attention.[2]

II. SCHLIE'S REPRESENTATION OF PETITIONER VIOLATED THE FUNDAMENTAL ETHICAL DUTIES OF LOYALTY AND CONFIDENTIALITY.

During the course of his representation of petitioner, Schlie violated at least two distinct ethical duties owed his clients: the duty of loyalty and the duty of confidentiality. These are not overly-detailed or obscure ethical canons. Rather, the duties of loyalty and confidentiality are among the most fundamental of professional norms, widely held and well understood. Schlie's failure to honor them here means that there can be no confidence that counsel "fulfill[ed] the role in the adversary process that the [Sixth] Amendment

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[2] Because this case arises on direct appeal, it provides what may be a rare opportunity to address the important Sixth Amendment question presented. Most ineffective assistance of counsel claims arise on habeas review. *See generally Massaro v. United States*, 123 S. Ct. 1690 (2003). As a result, they often are decided not on the merits of the issue, but rather on a finding that the state court decision was not "contrary to, or [did not] involve[] an unreasonable application of, clearly established Federal law" under the Anti-Terrorism and Effective Death Penalty Act. 28 U.S.C. § 2254(d)(1). This direct appeal thus presents an especially good vehicle for reaching the merits of the question presented.

envisions." *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

The Model Rules of Professional Conduct ("Model Rules") establish the duties of loyalty and confidentiality as the primary ethical duties owed by a criminal defense lawyer to a client.[3] Because they have been adopted by the United States District Court for the District of Nevada, the Model Rules governed Schlie's conduct in this case. *See* D. Nev. L.R. IA 10-7; Nev. Sup. Ct. R. 150. And that is not some peculiarity of which Schlie might have been unaware. The Model Rules govern the conduct of most attorneys, having been widely adopted in both state and federal courts. They constitute, in whole or in part, the official ethical code of 42 states– including the state of Colorado, where Schlie resides and practices. *See Law.'s Man. Of Prof'l Conduct (ABA/BNA)* at 01:3-01:8 (2003). And because the United States District Courts typically apply the ethical rules of the states in which they sit, the Model Rules have also become the primary authority for analyzing conflict of interest cases in the federal system. Linda A. Winslow, Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 Wash. L. Rev. 863, 863 n.5 (1987).

This Court has recognized, as recently as last term, that "'[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable'" under the Sixth Amendment.

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[3] The Model Rules are promulgated by the American Bar Association and, as such, are the legal profession's own expression of its ethical standards. This brief discusses the version of the Model Rules in effect during Schlie's representation of petitioner. The Rules were amended in August 2002 in ways that either do not affect this case or make even clearer Schlie's dereliction of duty. *See* Model Rules of Prof'l Conduct R. 1.7 (2002) ("Model R.") (specifically including duties to former clients within the scope of potential competing interests).

Wiggins v. Smith, 123 S. Ct. 2527, 2536 (2003) (quoting *Strickland*, 466 U.S. at 688-89). In evaluating Sixth Amendment claims of ineffective assistance, the Court has declined to establish on its own a set of "specific guidelines" for attorney performance. *Id.* at 2535; *Strickland*, 466 U.S. at 688. Instead, it has deferred in large measure to the expertise of the legal profession itself, "emphasiz[ing] that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins*, 123 S. Ct. at 2535 (quoting *Strickland*, 466 U.S. at 688); *see also Nix v. Whiteside*, 475 U.S. 157, 166-67 (1986) (scrutinizing ABA Model Code and Model Rules in course of Sixth Amendment analysis). That is not to say that professional standards necessarily and in all cases are dispositive of the Sixth Amendment question. *See Strickland*, 466 U.S. at 688. But this Court consistently and very sensibly has treated prevailing norms of practice, as reflected in the Model Rules, as the best guide to what constitutes "effective assistance of counsel" under the Sixth Amendment. *See id.* (Sixth Amendment "relies . . . on the legal profession's maintenance of standards sufficient to justify the presumption that counsel will fulfill the role in the adversary process that the Amendment envisions").

In this case, Schlie's prior defense of Swan, in the pre-indictment phase of the proceeding in which he represented petitioner, placed the ongoing duties of loyalty and confidentiality he owed to Swan as his former client in direct conflict with the duty of loyalty he owed petitioner as his current client. The Court of Appeals agreed, holding that "there was an actual conflict of interest," but failed to appreciate the necessary – and in this case, obvious – consequences of that conflict. Schlie's representation of petitioner violated fundamental ethical duties and deprived petitioner of his Sixth Amendment right to effective assistance of counsel.

A. Schlie Violated Separate Duties Of Loyalty To His Former And Current Clients.

1. The duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692; *see also* Charles W. Wolfram, *Modern Legal Ethics* 316 (1986) (duty of loyalty to a client is "a basic tenet of the Anglo-American conception of the lawyer-client relationship"). The Sixth Amendment guarantees the effective assistance of counsel because only effective counsel can assure that a trial becomes a "reliable adversarial testing process," *Strickland*, 466 U.S. at 688, "relied on as having produced a just result," *id.* at 686. In order to fulfill that role, counsel must commit his undivided attention to providing the defendant with the fullest possible defense, uncorrupted by competing loyalties. *See id.* at 688 ("counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest"). That did not happen here.

The duty of loyalty comprises two separate obligations – one to former clients and the other to current clients. Model Rule 1.9(a) expressly protects the rights of former clients, providing that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." [4] Thus, an attorney owes a former client a duty to avoid at the outset a representation that would be adverse to her interests, and a current client a continuing "duty to zealously advocate on her behalf, unhampered by any competing

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[4] Although the Court of Appeals did not address Swan's alleged waiver, it invalidated petitioner's waiver on grounds that would apply equally to Swan. *See* Pet. App. 11a-12a ("The waiver document stated that there was no conflict of interest, so it can hardly be read as waiving one. Also, the document was signed before the indictment was issued and a few years before trial, so it could not have taken into account the actual scope of the case as it proceeded.").

commitments to other clients." *Perillo v. Johnson*, 205 F.3d 775, 801 (5th Cir. 2000).

The rights of current clients are covered by Model Rule 1.7(b), which states that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . . ." This rule ensures that an attorney is in a position to "vigorously assert" a current client's interests, without any impairment of her commitment as a result of conflicting interests. Wolfram, *supra*, at 317. The comments specifically caution that "[l]oyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Model R. 1.7(b), cmt. 4 (1983).

Together, these restrictions are meant to ensure that every criminal defendant has his own champion, one single-mindedly dedicated to his best interests. In this case, Schlie's failure to faithfully observe his ethical duties meant that petitioner was deprived of counsel free to offer undivided and thus effective assistance.

2. Schlie's first ethical violation came at the moment he accepted petitioner's representation. As described above, Schlie owed a continuing duty of loyalty to his former client, Swan. That duty clearly extended to the post-indictment phase of the same proceeding in which he had represented Swan pre-indictment. *See* Model R. 1.9(a) (1983) (ethical bar covers representation "in the same or a substantially related" proceeding). Thus, by virtue of his former representation, Schlie was under a continuing obligation to avoid any course of action that would undermine *Swan*'s interests. There was no way to reconcile that obligation with petitioner's interest – which was to point the finger of blame at Swan.

In short, Schlie was ethically precluded from agreeing to represent petitioner in the first place. When heeded, Model Rule 1.9(a) – like similar conflict-of-interest norms – operates preemptively to avoid situations in which counsel's performance is hobbled by divided loyalties. Because Schlie chose to disregard Rule 1.9(a), that is exactly what happened here.

3. Schlie's second ethical breach was the violation of his duty of loyalty to his current client, petitioner. From the beginning, Schlie's prior representation of Swan sabotaged his ability to provide petitioner with effective legal assistance. Schlie was unable to make judgments based on objective and dispassionate strategy. Instead, he was required to tailor his defense of petitioner to meet his ongoing duty of loyalty to Swan. That constraint crippled Schlie's pretrial investigation, restricted the defense strategies available to him, and constrained his advocacy of petitioner's innocence.

The effect of this conflict was most apparent in Schlie's failure to adopt a blame-shifting strategy. As the court below conceded, petitioner "had an interest" in pursuing that strategy "[f]rom the beginning." Pet. App. 13a. But in combination with the duty owed to Swan, that interest rendered an actual conflict completely unavoidable. Indeed, it is "difficult to envision circumstances more fraught with inherent conflict than where an [attorney] must present a defense theory inculpating the attorney's former client, particularly where the former representation was factually intertwined with the criminal defendant's case." *Church v. Sullivan*, 942 F.2d 1501, 1511 (10th Cir. 1991).

It was obvious from the start that painting Swan as the blameworthy party was petitioner's best option. Swan's involvement in the illegal activities began long before Swan met petitioner, and continued long after he had run him out of the company. On the other hand, petitioner's business relationship with Swan lasted only a matter of months, and

petitioner was largely excluded from the business operations of the company. Nor did petitioner have any personal relationship with Swan, either before the merger or after his resignation from Teletek. By contrast, Shwayder's co-defendants included Swan's wife and his close friend and business associate. Against that background, the only sensible option for petitioner was to argue that the blame lay with Swan and those close to him – a category that did not include petitioner.[5] But instead of cutting Swan loose, Schlie entered a joint defense agreement with him. Instead of inculpating Swan to save his current client, Schlie never even hinted during his opening statement or the first half of trial that Swan had done anything wrong. Even after Swan pled guilty and provided damaging testimony against petitioner, Schlie mustered only a half-hearted attempt to shift the blame to him. He failed to vigorously attack Swan on cross-examination, and never accused him of lying under oath in order to win a reduced sentence. Nor did he attack Swan's credibility as a witness in his closing argument, once again failing to argue to the jury that Swan lied to them from the witness stand. Petitioner was left vulnerable to unchallenged attacks by the person his attorney should have pursued from the beginning.

This Court has recognized the difficulty in measuring the precise effect on strategy and performance when counsel labors under a conflict of interest. *See Strickland*, 466 U.S. at 692. *Amicus* agrees that such an effect is usually difficult to pinpoint. But this is the unusual case in which the effect is both obvious and obviously devastating. Schlie's conflicting interests left petitioner unprotected by a zealous advocate and without the benefit of his Sixth Amendment right to unconflicted counsel.

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[5] In fact, Swan's wife and another co-defendant were admitting their complicity and pleading guilty, even before the trial began. These guilty pleas render inconceivable the notion that Schlie did not anticipate the guilty plea by Swan that put counsel in the untenable position of cross-examining his own former client.

B. Schlie's Representation Of Petitioner Was Also Hindered By His Ongoing Duty Of Confidentiality To Swan.

Schlie owed his former client a continuing duty of confidentiality as well as one of loyalty. The duty of confidentiality prohibits an attorney from revealing, except in very limited circumstances, any "information relating to representation of a client unless the client consents after consultation...." Model R. 1.6(a) (1983). With respect to a former client, counsel may not "(1) use information relating to the representation to the disadvantage of the former client . . . or (2) reveal information relating to the representation . . . ." *Id.*, Model R. 1.9(c). That broad prohibition "extends to all confidential information, whether privileged or unprivileged, and whether learned directly from the client or from another source." *Perillo*, 205 F.3d at 799. And the duty of confidentiality is effectively permanent, continuing beyond the time of the representation and even beyond the client's death. *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998).

Like the ongoing duty of loyalty, the ongoing duty of confidentiality owed Swan prevented Schlie from presenting a full defense on behalf of petitioner. The most salient effect of this conflict, however, was on Schlie's cross-examination of his former client. That is no surprise. Courts have specifically recognized the inherent risk that an attorney "may fail to conduct a rigorous cross-examination for fear of misusing . . . confidential information" if the witness the attorney faces is a former client. *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (citing *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir. 1982)). "The potential for conflicting interests is particularly acute when, as here, the two clients are, or were, codefendants who allege different levels of culpability in the crime." *Id.* It is that functional concern – that a lawyer may be prevented from pursuing an effective cross-examination of a former client, to the

detriment of a current client – that lies behind ethical rules barring attorneys from conducting such cross-examinations. *See Wheat v. United States*, 486 U.S. 153, 164 (1988) (noting that attorney who previously represented witness in same or substantially related matter may not ethically cross-examine witness).

Schlie's conflicting duties to Swan and petitioner help to explain his lackluster cross-examination of Swan. Perhaps most important, they prevented Schlie from eliciting the fact that Swan lied to Schlie repeatedly about the bribery scheme during the course of the former representation. Such an admission – that Swan had lied to the person whose sole job was to defend his interests – would have emphasized the likelihood that he had lied to Shwayder as well, and underscored his lack of credibility to the jury. But the duty of confidentiality he owed to Swan precluded Schlie from even raising the subject.

Conflicts related to the duty of confidentiality are especially hard to detect and evaluate. The current client has no way of knowing what confidences were shared during a prior representation, and how those confidences may have negatively affected his attorney's representation of him. Thus, the district court in this case had only Schlie's word that he was not privy, by virtue of his former representation of Swan, to any confidential information that was not available from other sources. But only Schlie and his former client could know if that is true, and neither had an interest in assisting petitioner in pursuing his ineffective assistance claim.

Counsel in this case failed all relevant ethical benchmarks, leaving petitioner unable to mount the strongest defense available and thus without the effective assistance of counsel guaranteed by the Sixth Amendment. The Model Rules operate – when adhered to – to prevent precisely the kind of actual conflicts of interest that violate the Sixth Amendment. Because those Rules were not followed here,

counsel was unable to act as a zealous advocate on petitioner's behalf and could not play his "crucial role" in ensuring that the prosecution's case was put to a meaningful adversarial test. *Strickland*, 466 U.S. at 685.

III. THE COURT SHOULD REAFFIRM THAT *SULLIVAN*'S "ADVERSE EFFECT" STANDARD DOES NOT REQUIRE A SHOWING OF PREJUDICE.

1. This Court has long recognized that allegations of ineffective assistance of counsel premised on conflicts of interest raise distinct concerns under the Sixth Amendment and are thus subject to a distinct standard. General ineffective assistance claims are evaluated under *Strickland*'s familiar two-part test, requiring a claimant to show both that counsel's performance was deficient and that the deficiency prejudiced the defense. 466 U.S. at 687. But in *Holloway* and *Sullivan*, the Court established a separate rule for conflict of interest claims. Because undivided loyalty is so important, and because the effects of a breach of the duty of loyalty are so hard to identify, the inquiry is different. Where there is an actual conflict – defined in *Sullivan* as one that produces an "adverse effect" on counsel's performance – prejudice is presumed. 446 U.S. at 349.

This prophylactic safeguard is both eminently sensible and critically important. As the Court has repeatedly recognized, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692; *see also Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) ("to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible"). The problem is that a conflict of interest rarely makes itself felt in something an attorney *does* at trial, the effect of which might be gauged from the record. Instead, a conflict is far more likely to manifest itself in something an attorney *fails* to do – so that a reviewing court must first hypothesize what the at-

torney might have done and then identify the possible effect of that (purely conceptual) action on the defense. *See Holloway*, 435 U.S. at 490-91; *see also Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991) ("the dangers inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did: 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.'") (quoting *Holloway*, 435 U.S. at 489). In *Holloway* and *Sullivan*, the Court relieved defendants of what may be the impossible burden of pinpointing the prejudicial effects of a non-event.

2. Although the *Sullivan* rule appears straightforward, its application has been inconsistent. Petitioner well describes the disagreement in the lower courts as to the precise content of *Sullivan*'s "adverse effect" standard. *See* Pet. Br. at 15-19. The critical point here is that in some courts, this confusion has resulted in a situation where the "adverse effect" standard is just as demanding as – or even more demanding than – the *Strickland* prejudice requirement. *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 799 n.6 (1987) (Blackmun, J. dissenting) ("The distinction between a prejudice showing and a showing of adverse effect on an attorney's performance apparently has been difficult for some courts to discern."); *Freund v. Butterworth*, 165 F.3d 839, 873-74 (11th Cir. 1999) (Tjoflat, J. dissenting) (discussing how easily an adverse effect analysis can become blurred with a prejudice analysis); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 Baylor L. Rev. 171, 206 (2002) ("[i]llustrating the difference between the level of proof" under *Sullivan* and *Strickland* is "difficult").

Properly applied, the adverse effect standard is met when a defendant demonstrates that a "reasonable" or "plausible" alternative strategy was available, and that "the alternative defense was inherently in conflict with *or* not undertaken due to the attorney's other loyalties or interests." *See, e.g.*,

Freund, 165 F.3d at 860 (requiring "reasonable" strategy) (citations omitted) (emphasis added); *United States v. Feyrer*, 333 F.3d 110, 116 (2d Cir. 2003) (requiring only "plausible" strategy). It is enough, in other words, for a defendant to make either of two showings – including a showing that a conflict of interest would have made it impossible for counsel to pursue a helpful strategy. *See, e.g., Rubin v. Gee,* 292 F.3d 396, 405 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 637 (2002) (finding adverse effect where "the alternative decision was effectively unavailable to [defendant's attorneys]"); *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) ("it is enough to show that a conflict existed that 'was inherently in conflict with' a plausible line of defense or attack on the prosecution's case") (citation omitted); *cf. Lombardo v. United States*, 222 F. Supp. 2d 1367, 1385 (S.D. Fla. 2002) ("petitioners must prove that the representations were 'inherently in conflict'"). As petitioner explains, that standard is easily met here, where counsel was precluded by his conflict of interest from pursuing the best strategy available to his client. In any court applying that standard, this case would have been decided differently.

Some courts, however, are applying different standards – either expressly or as a matter of practice – and are blurring the line between adverse effect and prejudice. That merging of the standards does not reflect any lowering of the *Strickland* bar, but rather a heightening of the *Sullivan* standard. In some circuit courts, for example, deference to trial strategy has substituted for meaningful application of the "adverse effect" standard. *See Skinner v. Duncan*, 2003 U.S. Dist. LEXIS 10102, at *168 (S.D.N.Y. June 17, 2003) (citing *United States v. Mays*, 77 F.3d 906, 909 (6th Cir. 1996) and *United States v. Kindle*, 925 F.2d 272, 275-76 (8th Cir. 1991)). Other courts have added their own gloss to *Sullivan* by presuming prejudice only where a conflict "*significantly* worsens," rather than simply "adversely affects," counsel's representation. *See United States v. Mett*, 65 F.3d 1531,

1535-36 (9th Cir. 1995) (emphasis added).

Perhaps most troubling, several courts have adopted a "proximate cause" requirement that may actually make it more difficult to demonstrate adverse effect than prejudice – a perverse result, and certainly not what this Court intended. In these courts, only one showing will suffice to make out adverse effect: the defendant must show that that it was counsel's conflict of interest that actually *caused* her to forgo the advantageous strategy, and not some other factor. *See, e.g., United States v. Burgos-Chaparro*, 309 F.3d 50, 53 (1st Cir. 2002), *cert. denied*, 123 S. Ct. 922 (2003) (claimant must show that an alternative "course would have been undertaken *but for* counsel's dual loyalty") (emphasis added); *Beets v. Collins*, 65 F.3d 1258, 1285 (5th Cir. 1995) (requiring "proximate cause"); *Mays*, 77 F.3d at 908 (a defendant must show "that the conflict caused the attorney to make bad choices for his client."); *Gray-Bey v. United States*, 156 F.3d 733, 740 (7th Cir. 1998) (a defendant must "demonstrate a rational, causal connection between an existing actual conflict of interest and an adverse effect in counsel's representation contrary to the defendant's interests"); *Freund*, 165 F.3d at 869 (imposing a "but for" requirement). *Compare Malpiedi*, 62 F.3d at 469 ("This is not a test that requires a defendant to show that . . . but for the conflict, counsel's conduct of the trial would have been different.").

But inquiring into why a conflicted defense counsel failed to take some action only adds another level of "unguided speculation," *Holloway*, 435 U.S. at 491, to the search for prejudice in conflict cases. Now a court must not only determine what strategy an unconflicted counsel hypothetically might have pursued, but also what hypothetical motivations counsel might have had for his decision – none of which will be readily apparent from the record. And requiring evidence of proximate cause imposes a nearly insuperable evidentiary burden on defendants. Some courts have

applied that requirement so aggressively, and demanded such direct evidence of motivation, that it seems the burden could be met only in the unlikely event of an admission from counsel that his strategic decisions were guided by conflicting loyalties – an admission that would subject him to disciplinary action and serious reputational harms. *See, e.g.*, *Burgos-Chaparro*, 309 F.3d at 53 (conceding that counsel's decision could have been influenced by conflict of interest, "but [defendant] offers nothing to show that it was so affected"); *Moss v. United States*, 323 F.3d 445, 469 (6th Cir. 2003) (no adverse effect where defendant "fail[ed] to provide any specific and credible evidence linking [counsel's] erroneous advice to the conflict of interest."). Indeed, the government pressed for just such a standard below, arguing that the "testimony of the trial counsel is critical to . . . a determination [of adverse effect]." Gov't C.A. Br. at 19. A defendant in a "proximate cause" court has the worst of all worlds: representation hampered by counsel's conflicting interests, coupled with an almost complete inability to demonstrate how that conflict manifested itself in counsel's decisions.

The difficulty that inheres in establishing adverse effect under this heightened standard is nowhere more obvious than in the case at bar. Under the standard articulated in most courts, petitioner could easily prevail by demonstrating that a plausible or reasonable alternative strategy was inherently in conflict with counsel's duties to his former client. Yet here, despite the fact that Schlie was ethically precluded from advancing the strategy most helpful to petitioner – pointing the finger at his former client, Swan – the Court of Appeals held that there had been no showing that counsel's conflict of interest "adversely affected" his performance. But when an attorney's "ethical dilemmas restrict[] the strategies that [he can] use in defending [his client], the conclusion seems inescapable that an 'actual conflict' of interest 'adversely affected' the [counsel's] performance in representing him." *Freund*, 165 F.3d at 881; *see also Holloway*, 435 U.S. at 490

("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."). If defendants are required to demonstrate more in order to establish adverse effect, then they are no better off under *Sullivan* than they are under *Strickland*.

The *Sullivan* standard has been criticized precisely because it has proved nearly impossible to satisfy in practice. *See, e.g.*, *Recent Cases*, 115 Harv. L. Rev. 938, 944 (2002) ("The [adverse effect] test is nearly impossible to satisfy, requiring a defendant not only to imagine alternate strategies or trial tactics that his lawyer failed to pursue, but also to connect that failure to the conflict."); *Leading Cases*, 116 Harv. L. Rev. 242, 243 (2002) ("an adverse effect is nearly impossible to prove and . . . the requirement does not comport well with the Court's other Sixth Amendment jurisprudence."); *Mickens v. Taylor*, 535 U.S. 162, 210 (2002) (Breyer, J. dissenting) ("even with extensive investigation in post-trial proceedings, it will often prove difficult, if not impossible, to determine whether the prior representation affected defense counsel's decisions."); *Sullivan*, 446 U.S. at 355 (Marshall, J. concurring in part and dissenting in part) ("[The adverse effect] test is not only unduly harsh, but incurably speculative as well."). [6]

But the creation of a "nearly impossible" standard that does nothing to lessen a defendant's burden could not have

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[6] Others have argued that the limited presumption provided by *Sullivan* is of little use to defendants because those who are able to prove adverse effect are unlikely to have difficulty establishing prejudice as well. *See* Leading Cases, *supra*, at 249 (citing Tom Stacy & Kim Dayton, *Rethinking Harmless Error*, 88 Colum. L. Rev. 79, 109 (1988) (arguing that a presumption of prejudice after adverse effect is found does little to aid defendants; the real difficulty lies in proving adverse effect in light of "the discretionary and multifaceted nature of the judgments attorneys routinely make and the impossibility of assigning precise and unitary motives to these complex judgments")).

been what the *Sullivan* Court envisioned. The *Sullivan* standard was intended to serve as a "prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176. In order for *Sullivan* to provide meaningful protection to defendants burdened with conflicted counsel, the Court must clarify what that standard requires and reaffirm that it is intended to provide greater, not lesser, protection to defendants burdened with conflicted counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 02-1866

IN THE

Supreme Court of the United States

KEITH SHWAYDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LEGAL ETHICISTS DAVID LUBAN, L. RAY PATTERSON, RORY K. LITTLE, DEBORAH A. COLEMAN, AND W. WILLIAM HODES, IN SUPPORT OF PETITIONER

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IN THE

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INTEREST OF *AMICI CURIAE*[1]

Amici legal ethicists are professors and practitioners who are experts in legal ethics and professional responsibility.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Law. He has taught legal ethics since 1963. He is the author of LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY and a former reporter and consultant for the ABA Commission on Evaluation of Professional Standards.

Rory K. Little is a professor at the University of California Hastings College of Law and has been teaching criminal law and procedure and legal ethics since 1994. He is a past member of the ABA's Standing Committee on Legal Ethics and is a current member of the ABA's Criminal Justice Standards Committee. He is a former vice-chair of the San Francisco Bar Association's Ethics Committee, a former Associate Deputy Attorney General in the U.S. Dept of Justice, and a designer of the Department's Professional Responsibility Officer training program. He was a practicing criminal defense attorney for 3 years and a federal prosecutor for 7 years, and lectures extensively on legal ethics for prosecutors and criminal litigators.

Deborah A. Coleman is a practicing attorney in Cleveland, Ohio who has provided ethics counsel to lawyers for over 20 years. She regularly teaches, writes, and is involved in bar association activities on the topic of legal ethics. She is a past member and chair of both the ABA Standing Committee on Ethics and Professional responsibility and the Cleveland Bar Association Professional Ethics Committee. She is also a past member of the Advisory Committee to the Ohio Attorney General on Ethics and Professional Responsibility.

W. William Hodes is Professor Emeritus of Law at the Indiana University School of Law, where he taught legal ethics and other subjects from 1979 through 1999. He is the co-author of THE LAW OF LAWYERING, a nationally recognized treatise. He is a former chair of the AALS Section on Professional Responsibility, a former member of the National Conference of Bar Examiners Multi-State Professional Responsibility Examination drafting committee, and was a member of the Advisory Council to the American Bar Association Ethics 2000 Commission. Since 1999 he has been in private practice

with a focus on law-of-lawyering issues and is currently a Director of the Association of Professional Responsibility Lawyers.

Amici individually and collectively have devoted substantial portions of their professional and academic careers to studying the ethical norms surrounding the practice of law and continually strive to improve both the substance and operation of those ethical norms. Their interest in this case is in encouraging this Court to recognize the fundamental and critical importance of the duty of loyalty to the lawyer-client relationship, and to adopt reasonable means of protecting clients from breaches of that duty. By presenting their views in this brief, *amici* hope to assist the Court in safeguarding the fair and impartial administration of justice in the adversarial system and maintaining the necessary public confidence in our criminal justice system.

STATEMENT

This case presents especially apt circumstances for determining whether the presumption of prejudice that applies to conflicts arising from concurrent representation of criminal defendants also applies to conflicts arising from successive representation of clients in connection with the same criminal matter. There is no dispute that petitioner's counsel had an "an actual conflict of interest," and the court of appeals so held. Pet. App. 11a, 13a. There is no dispute that petitioner did not waive that conflict, and the court of appeals even held that the putative waiver form provided by counsel was affirmatively misleading in claiming that no conflict even existed. Pet. App. 5a, 9a, 11a-12a. And there is no dispute that throughout the majority of petitioner's representation, petitioner's counsel cooperated with his former client's new counsel and pursued a joint-defense strategy that was fully in the interest of his former client, but only dubiously in the interest of petitioner. Pet. App. 5a, 13a.

Petitioner's counsel in this case had previously represented one of petitioner's co-defendants during the pre-indictment phase of this case. Even after that representation ended and his former client obtained new counsel, petitioner's counsel continued to have ongoing duties of loyalty and confidentiality to his former client. Following the indictment, petitioner's counsel opted for a basic strategy of a joint defense between his past and present clients, and pursued that strategy throughout the pre-trial phase of the case and for the first month of the trial itself. Pet. App. 5a; Pet. 7. It was not until his former client pled guilty halfway through trial, and turned on petitioner in an effort to reduce his sentence, that petitioner's counsel was forced to switch strategies mid-stream and attempt to mitigate the damage caused by the earlier alignment among the defendants.

In the latter part of the trial, therefore, petitioner's counsel was forced to implicitly repudiate the joint defense position that none of the defendants had done anything improper. With his own and his client's credibility shattered, petitioner's counsel was left with defensive *post-hoc* efforts to limit the consequences of his former client's plea bargain. Trial preparation, the opening statement, and the first month in court thus were wasted, or even counter-productive, and the second half of trial was spent in an effort to dig petitioner out of the hole dug by his counsel's choice of strategy.

Given the defective joint defense strategy employed in this case, counsel's successive representations took on many of the damning characteristics of a concurrent representation, raised the same high risks of skewed judgment found in concurrent representation, and generated the same difficulties of proof for the disserved defendant forced to establish that a non-conflicted lawyer would have adopted a different defense approach. Indeed, counsel's continuing duties of loyalty and confidentiality to his former client, regarding the same matters at issue in the subsequent criminal trial, deprived petitioner of counsel's undivided loyalty and generated conflict-

ing *concurrent duties* notwithstanding the nominal end of the prior *representation.*

The clear actual conflict and the many similarities to a case of concurrent representation thus make this case a highly appropriate vehicle for deciding whether the presumption of prejudice adopted in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), should apply to such conflicted successive representation and for deciding the standard for demonstrating the adverse effect necessary to trigger the *Sullivan* presumption of prejudice.

SUMMARY OF ARGUMENT

1. Conflicts of interest arising from successive representations by the same attorney of different persons connected to the same criminal matter are frequently occurring events. Such conflicts have arisen in numerous cases throughout the country and are likely to continue to occur at a significant rate. The frequent occurrence of such conflicts suggests that any additional guidance from this Court in resolving the divergent views of the lower courts on the proper treatment of such conflicts would have substantial impact on the criminal justice system and thus would be a highly valuable use of this Court's resources.

2. The Ninth Circuit in this case applied an inappropriately high burden for proving an adverse effect from a clear and substantial conflict of interest arising from successive representation of two defendants with palpably inconsistent interests. The divided loyalties inherent in such successive representations can influence a defense attorney in numerous, and often subtle, ways, clouding his judgment and dulling his zeal. Such effects can be hard to discern and even harder to prove from a cold trial transcript. And the effects on preparation and strategy can remain unseen despite a defendant's diligent *post hoc* investigation.

Given such inherent difficulties of proof, requiring a defendant to prove what strategy or degree of zeal his attorney *would have* employed but for the conflict will inevitably leave

significant Sixth Amendment violations unremedied. Instead of the approach used by the Ninth Circuit, this Court should adopt the more lenient burden of proof used by the majority of circuits and hold that a defendant whose lawyer was burdened with a conflict of interest arising from successive representation need only demonstrate some plausible alternative defense strategy or tactic that *might have been pursued* but that was inherently in conflict with, or not undertaken because of, the attorney's divided loyalties or interests. That standard takes into account the difficulties of proof caused, in part, by the conflict of interest itself yet still requires a sufficient showing by defendants so as to avoid wholly unnecessary expenditure of judicial resources.

3. Maintaining a conflict-free system of criminal justice, and remedying such conflicts when they nonetheless occur, is of paramount importance to the integrity of our judicial system. Both the actual and perceived fairness of that system are necessary to ensure public confidence in, and support of, the criminal law. Where the state has brought to bear the power of the criminal justice system against an individual, only the undivided loyalty of defense counsel can stand as an adequate restraint upon that power. Once an admitted conflict of interest has undermined the integrity of the adversarial process, placing too-high a burden on defendants to prove the practical consequences of that breakdown renders empty the Sixth Amendment's right to counsel and threatens the fairness and effectiveness of the entire system. The petition thus raises questions of great national importance that should be resolved by this Court.

ARGUMENT

I. CONFLICTS OF INTEREST FROM SUCCESSIVE REPRESENTATIONS ARE A FREQUENTLY RECURRING PROBLEM IN THE CRIMINAL JUSTICE SYSTEM.

The questions presented in this case involve a common problem in the criminal justice system: conflicts of interest arising from a defense attorney's successive representation of different persons connected to an alleged crime. The numerous cases cited in the petition give an initial sense of the hardiness of the issue. *See* Pet. 13-14 (citing cases). Further evidence of the breadth of the issue can be found in the 161 cases discussing conflicts and successive representation, 74 of which were in the last five years.[2] In fact, this Court's most recent case involving a conflict from successive representation, *Mickens* v. *Taylor*, 535 U.S. 162 (2002), has been cited in 123 cases in the seventeen months since it was decided.

Determinations of whether conflicted representation had an adverse effect on a defendant likewise arise frequently, both in successive and concurrent representation cases. Once again, the petition itself cites numerous cases addressing the "adverse effect" requirement, and the well-developed split on the standard for proving such an effect testifies to the recurrence of the issue. Pet. 15-19. Furthermore, those portions of *Cuyler* v. *Sullivan* discussing the adverse impact of a conflict and the presumption of prejudice therefrom have been cited in 1766 cases, 492 of which were in the last five years.[3]

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[2] Based on an August 26, 2003 Westlaw search of all federal and state cases for "successive /2 representation /30 conflict" run both with and without the date restriction of "da(aft August 26, 1998)."

[3] Based on an August 26, 2003 Westlaw Keycite search limited to federal and state cases and Headnotes 19 and 21, run both with and without the date restriction of August 26, 1998.

The sheer frequency with which these issues have arisen, and have continued to arise over the last five years, suggests an ongoing and significant problem with conflicts of interest in the criminal justice system, the importance of the questions presented, and the utility of this Court devoting its resources to this aspect of the law.

II. VINDICATING SIXTH AMENDMENT RIGHTS REQUIRES A LESS RESTRICTIVE AND MORE OBJECTIVE STANDARD OF ADVERSE EFFECT FROM CONFLICTED SUCCESSIVE REPRESENTATION GIVEN THE DIFFICULTY OF ASSESSING THE RECORD MADE BY THE CONFLICTED ATTORNEY.

The questions presented by the petition also warrant this Court's review because the Ninth Circuit's restrictive view of what constitutes an adverse effect from conflicted representation and that court's still more restrictive treatment of successive representation cases are insufficiently protective of fundamental Sixth Amendment rights. Because conflicts of interest can infect the lawyer-client relationship in subtle ways, and can cause shifts in judgment and strategy that generate a plausible, but not optimal, defense, imposing a restrictive and subjective burden on a defendant to show that the conflicted lawyer was in fact influenced by the conflict in his basic strategy will leave many a distorted defense unremedied.

Many such shifts in judgment or strategy will not be readily evident in the record and may not ever be detectable by the defendant. As this Court has recognized, a legal representation "contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 812-13 (1987) (plurality opinion) (discussing the effect of a non-disinterested prosecutor). A breach of the duty of loyalty, such as at issue in this case, can affect invisibly almost every decision in the representation. It can blunt the lawyer's advocacy, undermine

his independent professional judgment, and inhibit his creativity. Assessing the actual consequences of such inhibition can be daunting. In fact, there often is no way to recreate what might have, could have, or should have happened if the accused were represented by a lawyer with undivided loyalty. *Cf. In re Richardson*, 675 P.2d 209, 214 (Wash. 1983) ("[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.").

In fact, reliance on the record of the trial to determine whether actual conflicts had adverse effects on the representation will systematically cause courts to underestimate the negative effect of such conflicts because the effects may be sins of omission not easily reflected in the record. And the subjective inquiry into what counsel *would have done* absent the conflict improperly focuses on the self-serving rationalizations of the conflicted attorney himself, fostering unreliable determinations of adverse effect.

A breach of loyalty may be apparent, but this Court and the lower courts have repeatedly recognized that the effects of a breach are not: "[I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). Other courts agree, observing that when a defense lawyer has a conflict of interest, "the prejudice may be subtle, even unconscious." *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974). Because a cold record cannot be expected to disclose "the erosion of zeal which may ensue from divided loyalty," *id.*, the *Castillo* court refused to require that the defendant identify specific instances in which his lawyer's conflicting loyalties adversely affected his representation. *See also State* v. *Watson*, 620 N.W.2d 233, 236 (Iowa 2000) ("'A cold, dispassionate appellate transcript simply cannot provide an adequate basis for assessing [defense counsel's] performance, for

subtle variations in demeanor and depth of cross-examination cannot be reflected in the pages of a transcript.'") (quoting *Zuck* v. *Alabama*, 588 F.2d 436, 440 (CA5), *cert. denied*, 444 U.S. 833 (1979)).

The problems with imposing a substantial hurdle for the proof of an adverse effect are apparent from this case. Prior to trial, defendant's attorney, Schlie, in cooperation with his former client's new attorney, refrained from pursuing a strategy of shifting the full blame to his former client, Swan, who was the alleged, and eventually admitted, central actor in the bribery scheme. Instead, Schlie opted for a joint defense strategy designed to vindicate his former client and to deny the underlying criminal conduct. Pet. App. 5a. That strategy was a disaster and had to be abandoned mid-trial when Swan pled guilty and switched sides to testify for the government against petitioner. Pet. App. 5a.

Whether a non-conflicted lawyer would have adopted the same strategy *ex ante*, despite the palpable risks, is impossible to prove with any certainty. But what is eminently clear is that the original choice of strategy in this case was necessarily made through the clouded lens of Schlie's conflict of interest. The decision to join forces with his former client's new counsel in a sink-or-swim-together approach could not help but have been influenced by Schlie's continuing loyalty to his former client, and inevitably detracted from Schlie's loyalty to petitioner.

Schlie's subsequent explanations and defense of his strategic choice simply cannot be considered independent of the divided loyalty stemming from the conflict of interest. For example, the claim that use of mock jurors led to abandonment of a finger-pointing strategy, Pet. App. 9a-10a, simply raises more questions than it answers. It seems more than likely that Schlie's presentation of the alternative strategy to those jurors was skewed by Schlie's conflict-causing loyalty to his prior client and hence his unwillingness or inability to attack him with vigor. Similarly, Schlie's interpretation of

the responses and reactions of the mock jurors necessarily flowed through the tainted lenses of his past efforts to prevent Swan's indictment in connection with the very same bribery scheme.

Given that Schlie would have been in an awkward or impossible position if he had elected to attack his former client from the outset, his judgment regarding strategy was highly suspect, and his explanation of his strategic choices cannot be accepted at face value. *See United States* v. *Malpiedi*, 62 F.3d 465, 470 (CA2 1995) ("[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations."). Indeed, Schlie's divided loyalties and distorted judgment is evident from his unbelievable failure to recognize or admit the clear conflict of interest even *after* his former client flipped sides and began testifying for the government *against* petitioner. Pet. App. 10a, 12a, 14a n. 5.

In light of the almost inevitable bias created by conflicts such as the one in this case, the Ninth Circuit's restrictive and subjective burden of proof "is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict." *People* v. *Stoval*, 239 N.E.2d 441, 444 (Ill. 1968); *cf. Glasser* v. *United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

The better approach is that taken by the majority of courts, which requires only that a disserved client point to a plausible alternative strategy that would have been foreclosed by the conflict. Whether or not counsel would have in fact pursued that strategy absent the conflict is irrelevant, because

counsel never had the opportunity to make such a conflict-free determination. *See, e.g.*, *Malpiedi*, 62 F.3d at 469 ("Counsel's inability to make * * * a conflict-free decision is itself a lapse in representation."). The majority approach has the benefit of focusing on the objective criteria of what strategies were available but incompatible with the conflict, thus offering a more reliable means of remedying Sixth Amendment violations.[4]

III. THE PETITION PRESENTS QUESTIONS OF NATIONAL IMPORTANCE TO THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM AND THE PUBLIC'S CONFIDENCE IN THAT SYSTEM.

As this Court has often recognized, the judicial system in general, and the criminal justice components of that system in particular, depend both on ensuring that proceedings are in fact fair and also on ensuring that they be seen by the public as being fair. For the criminal justice system to serve its varied functions and maintain social stability, the public must have confidence in the fairness of that system. The importance of avoiding improper influences on jurists goes without saying, and this Court has even recognized the importance in having the prosecutor – necessarily adverse in interest to the defendant – not be improperly biased against his opponent.

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[4] *Amici* note that the majority approach to demonstrating an adverse effect from a conflict still only triggers the *Mickens* presumption of prejudice. In appropriate circumstances that presumption could be overcome. Additionally, this case involves a clear conflict of interest not waived by the defendant. A case involving an *effective* waiver would present different considerations, as would a case in which a defendant purposely sandbagged the court and the prosecution by concealing a conflict that had not been waived only to play that "trump" card in the event the trial went badly. There are no allegations of such sand-bagging in this case, and the facts as described by the Ninth Circuit suggest quite the opposite – that petitioner was misled by his attorney who denied that a conflict even existed and failed to disclose the limits imposed by his former client.

See Young, 481 U.S. at 811-812 (plurality opinion) ("[W]hat is at stake is the public perception of the integrity of our criminal justice system. '[J]ustice must satisfy the appearance of justice,' * * * and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite.") (citation omitted). But the importance of having the defendant's own lawyer free from the taint of conflict is of even greater importance to the integrity of our adversarial system because that lawyer is the only person tasked with dedication to the defendant's interests above all others.

Where the one person on a defendant's side cannot be trusted, and a defendant cannot obtain relief even after having demonstrated an actual conflict of interest, the public's faith in the fairness of the system is sure to suffer. A suspect representation, which could have failed in so many places and at so many levels, produces a verdict that has not been tested adequately by the adversarial process and, thus, cannot be trusted. Members of the public will likely conclude from such a failure not only that they cannot have confidence in the result in the specific case itself, but also in all future cases in which they or persons they know may have the misfortune of being the object, rightly or wrongly, of the criminal justice system. *Cf. United States* v. *Olano*, 507 U.S. 725, 736 (1993) (discussing the need to correct errors that seriously affect the "'fairness, integrity or public reputation of judicial proceedings'"). "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." *Emle Indus., Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (CA2 1973).

As this Court recognized in *Wheat* v. *United States*, 486 U.S. 153, 160 (1988), the "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Anything

less than an effective remedy for genuine conflicts of interest undermines not only the lawyer-client relationship and the Sixth Amendment right to counsel, but also public support for the justice system. In light of the damage to the system as a whole from unremedied conflicts of interest, the questions presented by the petition are of great national importance and should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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